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A TREATISE
ON
THE LAW
OF
EXECUTORS AND ADMINISTRATORS

BY
THE RIGHT HONOURABLE
SIR EDWARD VAUGHAN WILLIAMS
(LATE ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS).

ELEVENTH EDITION
BY
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PREFACE

TO THE ELEVENTH EDITION.



MORE than fifteen years have elapsed since the Tenth Edition of this work was published, and though no great legislative changes on the subject have taken place during that period it goes without saying that there have been a very large number of decisions which have necessitated the introduction of much new matter. The size of the work has, however, not been increased but considerably reduced—a result brought about by the omission of a good deal of more or less obsolete matter. In preparing this Edition great care has been taken to preserve as far as possible the text of the original Author, the value and authority of which are constantly shown by references thereto in the judgments of the Courts and reported cases. The aim of the present Editor has been to lay before the practitioner of to-day a modern and practical treatise founded on the great learning and authority of Sir EDWARD VAUGHAN WILLIAMS.

The Chapters on Probate (pp. 201—476) have been prepared by Mr. H. CLIFFORD MORTIMER, of the Inner Temple, whose valuable assistance is gratefully acknowledged.

S. E. W.

LINCOLN'S INN,
November, 1920.

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PART THE FIRST.

THE APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.



BOOK THE FIRST.

THE ORIGIN OF WILLS: AND THEIR NATURE AND INCIDENTS.



CHAPTER THE FIRST.

THE ORIGIN OF WILLS.

ALTHOUGH from the time of the Norman Conquest, until the passing of the Statutes of Wills (32 & 34 Hen. VIII.), a subject of this realm had, generally speaking, no Testamentary power over *Land* (a); yet the power of making a Will of *Personal Property* appears to have existed and continued from the earliest period of our Law. And, under the description of personal property so disposable, are not only to be considered goods and chattels, but also terms for years and chattel interests in Land, which, on account of their original insignificance, were deemed personalty, and as such were disposable by Will (b).

History of testamentary power over personal property.

But this power, it seems, did not extend to the whole of a man's personal estate, unless he died without either wife or issue; for by the common law, as it stood, according to Glanvil, in the reign of Henry II., a man's goods were to be divided into three equal parts; one of which went to his heirs, or lineal descendants, another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety, and the other went to his children: and so, *è converso*, if he had no children, the wife was entitled to one moiety,

At common law a man could not bequeath the whole of his personal estate, unless he died without either wife or children:

(a) Cruise, T. 38, Ch. 1.

(b) Co. Lit. 111, b. n. (1), by Hargrave.

Writ de rationabili parte bonorum.

and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal (c). The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them (d).

Alteration of the law.

There has, however, been a controversy whether this was the general law of the land, or only such as obtained in particular places by custom (e); the law, however, whether general or prevailing in particular places only by custom, was altered by imperceptible degrees, and by a succession of statutes the old common law was abolished throughout the kingdom of England, so that a man might bequeath the whole of his chattels.

History of Testamentary power over Land.

As regards the power of devising real estate, prior to the Norman Conquest land appears to have been devisable (f), but subsequently thereto, on the introduction of the feudal law, the feudal doctrine of the non-alienation of land in any manner without the consent of the over-lord had the effect of abrogating this right; for it was as much against the nature of a feud that the feudatory should dispose of it by Will as that he should otherwise alien it, and accordingly no estate in land greater than a term of years could, after the Conquest, be disposed of by Will (g); with the exception that in Kent, and in some boroughs and manors, the right or custom of devising was indulged and allowed to continue (h). The feudal restraint on alienation by deed did not continue very long, but the restraint as to the power of devising land itself lasted for some centuries.

Effect of the feudal law.

Devise of uses.

But though the land was not devisable until the reign of Henry VIII., yet upon a distinction taken soon after the passing of the Statute *Quia Emptores*, 18 Ed. I. (1290), between the land and the use or profits of the land, feoffments to uses were invented; by means whereof a man, though he could not devise the land, was enabled by Will to dispose of the profits of the land, and such devises were enforced by the Court

(c) 2 Bl. Comm. 492.

(d) Fitzherbert, Nat. Brev. 122, L. 9th edit.; 2 Saund. 66, n. (9). As to persons who might join in the writ, see Co. Lit. 176 b. n. (3), by Hargrave.

(e) As to this controversy and the gradual alteration of Law, see the earlier Editions of this Work and the authorities therein collected. Pt. I., Bk. I., Ch. I.

(f) Wright's Ten. 172.

(g) 2 Inst. 7.

(h) Wright's Ten. 173; Lit. s. 167; Co. Lit. 111. See Rob. Gavel. 235.

of Chancery (*i*). Subsequently, by the Statute of Wills (32 Hen. VIII. c. 1, explained by 34 & 35 Hen. VIII. c. 5), it was enacted that all persons being seised in fee simple (except *femes covert*, infants, idiots and persons of non-sane memory) might devise by Will to any other person (except to bodies corporate) two-thirds of their lands and hereditaments held in chivalry, and the whole of their lands held in socage; and this right subsequently became extended, through the alteration in tenures made by the Act of 12 Charles II. c. 24, which turned the military tenures into socage tenures, to all land other than copyhold: and a devise under these statutes could be made of the equitable as well as of the legal estate.

Now, by stat. 1 Vict. c. 26 (which repealed the above-mentioned statutes, except as to Wills made before the 1st of January, 1838), it is enacted (sect. 3) that it shall be lawful for every person to devise, bequeath or dispose of, by his Will executed as required by the Act, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death.

As by the Land Transfer Act, 1897, real estate (subject to certain exceptions in the Act mentioned) devolves, notwithstanding any testamentary disposition, on the personal representatives as if it were a chattel real vesting in them, and is subject to administration in like manner as chattels real vesting in them, the scope of this treatise now extends to real as well as personal estate. The provisions and effect of the Land Transfer Act, 1897, so far as that Act relates to the subject-matter of this work, will be fully dealt with in a subsequent part of this treatise.

(*i*) Cf. *post*, p. 4 and n. (*b*); Wright's Ten. 173; Co. Lit. 111 b. (note 1).

CHAPTER THE SECOND.

THE NATURE AND INCIDENTS OF WILLS AND CODICILS.

Definition of
a Will and
Testament.

A LAST Will and Testament is defined to be "the just sentence of our will, touching what we would have done after our death" (*a*); and in strictness the definition might, perhaps, be narrowed by adding "respecting personal estate;" for a devise of *Lands* is considered by our Courts not so much in the nature of a Testament, as of a conveyance by way of appointment of particular lands to a particular devisee (*b*). Upon that principle it was established that a man could devise those lands only which he had at the time of the date of such conveyance, and that no after-purchased lands would pass, whatever words might be used (*c*): whereas a Will and Testament would operate upon whatever personal estate a man died possessed of, whether acquired before or after the execution of the instrument. By the Wills Act (1 Viet. c. 26, s. 3), the power of disposing by Will was extended to all such real and personal property as the testator may be entitled to at the time of his death notwithstanding that he may become entitled to the same subsequently to the execution of his Will.

In strictness, according to the older authorities of the ecclesiastical law, the appointment of an executor was essential to a

(*a*) Swinb. Pt. 1, s. 2; Godolph. Pt. 1, c. 1, s. 2; 2 Black. Comm. 499.

(*b*) *Harwood v. Goodright*, Cowp. 90, by Lord Mansfield; 1 Saund. 277, *e. note* (4) to *Duppa v. Mayo*. It is said by Lord Coke, Co. Lit. 111, *a*, that in law, most commonly *ultima voluntas in scriptis* is used where lands or tenements are devised, and *testamentum* when it concerneth chattels. See also to the same effect, Godolph. Pt. 1, c. 6, s. 7.

(*c*) 1 Saund. 277, *e. n.* (4). *Wind v. Jekyl*, 1 P. Wms. 575. It did not turn upon the construction of the statutes of Wills (32 Hen. VIII. c. 1, & 34 Hen. VIII. c. 5), which say that any person *having* land may devise (as it has sometimes been said: see Toller on Executors, p. 2); for the same rule held before the statute, where lands were devisable by custom: *Harwood v. Goodright*, Cowp. 90, by Lord Mansfield; *Brunker v. Cook*, 11 Mod. 122; *Brydges v. Duchess of Chandos*, 2 Ves. 427; 1 Wms. Saund. 277, *e. n.* (4).

testament. "The naming or appointment of an executor," says Swinburne (*d*), "is said to be the foundation, the substance, the head, and is indeed the true formal cause of the testament, without which a Will is no proper testament, and by the which only the Will is made a testament." So Godolphin observes (*e*), that "the appointment of an executor is the very foundation of the testament, whereof the nomination of an executor, and the *justa voluntas* of the testator, are two main essentials." In *Woodward v. Lord Darcy* (*f*), it was laid down by the common law judges, that "without an executor a Will is null and void," but this strictness has long ceased to exist (*g*), as will appear in a subsequent chapter (*h*). And even by the old authorities above mentioned, an instrument which would have amounted to a testament, if an executor had been nominated, was recognised as obligatory on him who had the administration of the goods of the deceased, under the appellation of a codicil: which is accordingly defined by Swinburne (*i*) and Godolphin (*k*), to be "the just sentence of our will, touching that which we would have done after our death, *without the appointing of an executor*:" and hence a codicil was called "an unsolemn last Will" (*l*). It was termed codicil, *codicillus*, as a diminutive of a testament, *codex* (*m*).

Codicil.
Old meaning
of word.

But although it appears that "codicils" might have been made by those who died without testaments (*n*), yet the more frequent use of a codicil was as an addition to or alteration of his Will made by a testator, and annexed to, and to be taken as part of his testament (*o*): in which sense the term "codicil" is now used.

Codicil.
Modern mean-
ing of word.

A codicil, in this latter sense, is part of the Will, making together one testament (*p*). But in *Fuller v. Hooper* (*q*), where

(*d*) Pt. 1, s. 3, pl. 19.

(*e*) Pt. 1, c. 1, s. 2.

(*f*) Plowd. 185.

(*g*) *Wyrall v. Hall*, 2 Chanc. Rep. 112.

(*h*) *Post*, Pt. 1. Bk. II. Ch. II. § III.

(*i*) Pt. 1, s. 5, pl. 2.

(*k*) Pt. 1, c. 6, s. 2.

(*l*) Swinb. Pt. 1, s. 5, pl. 4; Godolph. Pt. 1, c. 6, s. 2.

(*n*) Godolph. Pt. 1, ch. 6, s. 1.

(*o*) Swinb. Pt. 1, s. 5, pl. 9; Godolph. Pt. 1, c. 6, s. 3.

(*o*) Swinb. Pt. 1, s. 5, pl. 5; Godolph. Pt. 1, c. 6, s. 1.

(*p*) *Fuller v. Hooper*, 2 Ves. Sen. 242, by Lord Hardwicke; *Sherer v. Bishop*, 4 Bro. C. C. 55; but this decision has been considered as carrying the principle too far, and in *Hall v. Severne*, 9 Sim. 515,

(*q*) 2 Ves. Sen. 242, and Supplement by Belt, 333.

a person by Will gave legacies to all her nephews and nieces, *except those thereafter named*, and desired her executors to look upon all memoranda in her handwriting as parts of, or a codicil to, her Will; and then bequeathed the residue to the children of her sisters; and by a codicil she gave legacies to some other nephews and nieces; Lord Hardwicke held, that the nephews and nieces mentioned in the subsequent part of the Will, *and those not mentioned in the codicil*, were excluded from the first-mentioned legacies; because the testatrix meant to refer, not to her Will or Testament, which takes in all the parts, but to the particular instrument (*r*).

A Will is different in its nature from a deed:

A Will is in its nature a different thing from a deed, and although the testator happen to execute it with the formalities of a deed; *e.g.*, though he should seal it, which is no part or ingredient of a Will; yet it cannot in such case be considered as a deed (*s*).

in all cases revocable:

It is also a peculiar property in a Will, as will hereafter more

518, Shadwell, V.-C., said he could not accede to it. The effect of a codicil confirming a Will is to bring the Will down to the date of the codicil and effect the same disposition of the testator's estate as if he had at that date made a new Will containing the same dispositions as the original Will, but with the alterations introduced by the various codicils: *Re Fraser*, [1904] 1 Ch. 726; *Re Whiting*, [1913] 2 Ch. 1; *Re Smith*, [1916] 2 Ch. 368; and this is so even though the Will be described by its date: *Green v. Tribe*, 9 C. D. 231; *Crosbie v. Macdowall*, 4 Ves. 619; *In the goods of De-la Saussaye*, L. R. 3 P. & D. 42; but not necessarily if the earlier codicil through want of attestation or otherwise has no proper vigour of its own, but derives its force (if at all) from the later codicil: *Burton v. Newbery*, 1 C. D. 234, disapproving *Gordon v. Reay*, 5 Sim. 274. In the one case the question is whether the later codicil revokes an earlier operative one: in the other, whether the later codicil sets up an earlier inoperative one. The intention to revoke a bequest once operative must be clear: *Follett v. Pettman*, 23 C. D. 337, 343; *In the goods of Carritt*, 66 L. T. 379; *McLeod v. McNab*, [1891] A. C. 471 (P.C.); *French v. Hoey*, [1899] 2 I. R. 472; *Re Stoodley*, [1916] 1 Ch. 242; *Re Florence*, 87 L. J. Ch. 86.

(*r*) So, in *Early v. Benbow*, 2 Coll. 354, the testator, by his Will, directed that the legacies "hereinbefore by me bequeathed" should be paid free of legacy duty: By a codicil which he directed might be taken as part of his Will, he gave other legacies: and Knight Bruce, V.-C., held that the legacies given by the codicil were not given free of legacy duty, his Honour being of opinion that the word "herein" was meant to refer to no more than the particular instrument in which it was contained. However, several cases may be found, where an additional legacy given by a codicil, though not so expressed, has been held subject to the same incidents as the original legacy given by the Will. See *Day v. Croft*, 4 Beav. 561; *Warwick v. Hawkins*, 5 De G. & Sm. 481; and *post*, Pt. III. Bk. III. Ch. II. § VII.

(*s*) *Lord Darlington v. Pulteney*, 1 Cowp. 260. See *post*, Pt. I. Bk. II. Ch. II. § III. p. 79, as to what instruments are testamentary.

fully appear, that by its nature it is in all cases a revocable instrument, even should it in terms be made irrevocable (*t*); for it is truly said, that the first grant and the last Will is of the greatest force (*u*).

Another essential difference between a Will and a deed may be mentioned, that there cannot be a conjoint or mutual Will: an instrument of such a nature is unknown to the testamentary law of this country (*x*). But there are several authorities which appear to show that this doctrine does not go further than to deny that a conjoint or mutual Will can be made with the characteristic quality of being irrevocable, unless with the concurrence of the joint or mutual testators. Such a Will is certainly revocable, though it may in equity be of effect as a contract (*y*). If either of the testators die without revoking it, the Will is valid and entitled to probate on his death as far as respects his property (*z*). But if the survivor after taking any benefit under the agreement alters his will, although it will stand if validly executed, yet his personal representative will take the property subject to a trust to perform the agreement (*a*). Where two testators made a joint Will containing devises and legacies to take effect after the decease of both of them, it was held that probate could not be granted of the Will during the lifetime of either (*b*); but this case has been disapproved of (*c*).

(*t*) *Vynior's Case*, 8 Co. 82 *a*. See *post*, Pt. I. Bk. II. Ch. III.

(*u*) Co. Lit. 112 *b*.

(*x*) 1 Cowp. 268, in Lord Mansfield's judgment; *Hobson v. Blackburn*, 1 Add. 277.

(*y*) See *post*, Pt. I. Bk. II. Ch. III., as to the irrevocability of such a Will in Equity as a contract.

(*z*) *In the goods of Stracey*, Dea. & Sw. 6; *In the goods of Lovegrove*, 2 Sw. & Tr. 453.

(*a*) *Stone v. Hoskins*, [1905] P. 194; and see *In the estate of Heys*, [1914] P. 192.

(*b*) *In the goods of Raine*, 1 Sw. & Tr. 144.

(*c*) *In the estate of Heys*, [1914] P. 192; *In the goods of Miskelly*, Ir. Rep. 4 Eq. 62. See *In the goods of Piazz Smith*, [1898] P. 7.

there cannot
be a joint
Will.

BOOK THE SECOND.

THE MAKING, REVOCATION AND REPUBLICATION OF WILLS.

CHAPTER THE FIRST.

WHO IS CAPABLE OF MAKING A WILL.

IT may be laid down generally, that all persons are capable of disposing of their property by testament, who have sufficient discretion and their own free will, and who have not been guilty of certain offences (*a*). Wherefore there are three grounds of incapacity: 1, the want of sufficient legal discretion; 2, the want of liberty or free will; 3, the criminal conduct of the party.

Aliens.

33 & 34 Vict.
c. 14.

This may be the proper place to mention two cases which do not come, in strictness, under any of the above heads. Formerly, alien friends, or aliens whose countries were at peace with ours, might make Wills to dispose of their personal estate, although being incapable of holding real property (including chattels real (*b*)), they were of course equally so of devising it; but alien enemies, unless they had the King's licence, express or implied, to reside in this country, were incapable of making any testamentary disposition of their property (*c*). Now by sect. 2 of the Naturalization Act, 1870, real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by

(*a*) Swinb. Pt. 2, s. 1. See also Wills Act, 1 Vict. c. 26, s. 7.

(*b*) An alien friend and merchant might, however, hold a lease for years of a house for his habitation, but on his death or departing out of the realm the lease devolved on the King. Co. Lit. 2 *b.*: and stat. 32 Hen. VIII. c. 16, s. 13, made void all leases of houses or shops to an alien artificer or handicraftsman.

(*c*) Wentw. c. 1, p. 35, 14th edit.; Vin. Abr. Devise, G. 17; Bac. Abr. Wills, B. 17.

a natural-born British subject (*d*). But although the words "disposed of by an alien in the same manner in all respects as a natural-born British subject" include a disposition by Will, they do not affect the form of the Will nor enable a foreigner not domiciled in England to dispose of personal estate by a Will which is not valid according to the law of his own country: and a Will of personal estate executed by him according to the formalities required by English Law is not made valid by the provisions of the Naturalization Act, 1870, and is ineffectual if it is not made in compliance with the requirements of the law of his country of domicile (*e*).

With respect to the power of the reigning Sovereign to make a Will of his or her property;—it appears by the Rolls of Parliament, that in the sixteenth year of King Richard the Second, the Bishops, Lords and Commons, assented in full Parliament, that the King, his heirs and successors, might lawfully make their testaments (*f*). And the statute 39 & 40 George III. c. 88, s. 4 (*inter alia*), enacted and declared that it should be lawful for his Majesty, his heirs and successors, by Will in writing signed and published in the presence of and attested by three or more witnesses, to devise his or their private lands and hereditaments of any tenure; and by sect. 10 of the same Act it was provided "that all such personal estate of his Majesty, and his successors respectively, as shall consist of monies which may be issued or applied for the use of his or their privy purse, or monies not appropriated to any public service, or goods, chattels, or effects, which have not or shall not come to his Majesty or shall not come to his successors respectively, with or in right of the Crown of this realm, shall be deemed and taken to be personal estate and effects of his Majesty and his successors respectively, subject to disposition by last Will and Testament,

The King or
Queen.

(*d*) But it is provided by sub-sect. 3 of sect. 2, "that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately in possession or expectancy in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act." See 4 & 5 Geo. V. c. 17, s. 17, *post*, p. 364.

(*e*) *In the goods of Von Buseck*, 6 P. D. 211. See also *Bloxam v. Favre*, 8 P. D. 101; 9 P. D. 130. See *post*, Pt. I. Bk. IV. Ch. II. § VI.

(*f*) 4 Inst. 335. Whether kings and sovereign princes can make their testaments, says Godolphin (Pt. 1, c. 7, s. 4), is resolved in the affirmative; but of what things, is such a *questio statûs*, as is safest resolved by a *noli me tangere*. See also Swinb. Pt. 2, s. 27. See *Att.-Gen. v. Dean and Canons of Windsor*, 8 H. L. Cases, 369.

and that such last Will and Testament shall be in writing, under the sign manual of his Majesty and his successors respectively, or otherwise shall not be valid; and that all and singular the personal estate and effects whereof or whereunto his Majesty or any of his successors shall be possessed or entitled at the time of his and their respective demises, subject to such testamentary disposition as aforesaid, shall be liable to the payment of all such debts as shall be properly payable out of his or their privy purse, and that subject thereto, the same personal estate and effects of his Majesty and his successors respectively, or so much thereof respectively as shall not be given or bequeathed or disposed of as aforesaid, shall go in such and the same manner, on the demise of his Majesty and his successors respectively, as the same would have gone if this Act had not been made."

By statute 25 & 26 Vict. c. 37, it is provided (sect. 5) that the private lands and hereditaments of her late Majesty, her heirs and successors, situate in any part of her Majesty's dominions (except Scotland) be disposed of by her Majesty, her heirs and successors, in manner provided by sect. 4 of the Act 39 & 40 Geo. III. c. 88, provided always that a Will, or other testamentary disposition of any such private estates should not require publication, and should be valid and effectual if signed in the presence of two witnesses, and that every Will of such private estates should be construed with reference to the property comprised therein, to speak and take effect as if it had been executed immediately before the death of the testatrix or testator, unless a contrary intention should appear by the Will. And sect. 6 of the same Act gives power for the disposition either *mortis causâ* or *inter vivos* of her said Majesty, her heirs and successors' private estates in Scotland.

The Queen
Consort.

Further, by sects. 8 and 9 of the statute 39 & 40 Geo. III. c. 88, it is provided that the Queen Consort for the time being may, during the joint lives of herself and the King, by Will in writing signed and published by her in the presence of and attested by three or more witnesses, dispose of her private lands and hereditaments, and by Will in writing bequeath her private personal estate as effectually as if she were sole and unmarried.

No jurisdiction
to grant
probate of

But the Court has no jurisdiction to grant probate of the Will of a deceased Sovereign. On one occasion (*g*), an application

(*g*) *In the goods of his late Majesty George III.*, 1 Add. 255; 3 Sw. & Tr. 199.

was made to the Prerogative Court of Canterbury for its process, calling in the Proctor of his Majesty, King George IV., to see and hear an alleged testamentary paper of his late Majesty King George III. propounded and proved: but the Court refused the application, on the ground that in substance the process was prayed, and a demand adversely made, against the reigning Sovereign; contrary to the established doctrine, that no action or suit, even in civil matters, can be brought against the King. The learned judge, Sir John Nicholl, in the course of his judgment, observed, that the history of the Wills of Sovereigns, from Saxon times, from Alfred the Great down to the present day, had been diligently searched and examined; but no instance had been produced of any Sovereign having taken probate in the Archbishop's Court, or of any Sovereign's Will having been proved there (*h*); nor any instance of any successor of any intestate Sovereign coming to the Court for letters of administration; which the learned judge considered as furnishing decisive evidence that the Court had no jurisdiction whatever therein (*i*). This decision was subsequently approved and acted on by Sir Cresswell Cresswell (*j*).

Will of
deceased
Sovereign.

SECTION I.

Persons incapable from want of Discretion.

In this class are to be reckoned infants, with respect to whom it is enacted by stat. 1 Vict. c. 26, s. 7, "that no Will made by any person under the age of twenty-one years shall be valid." Prior to the passing of this Act an infant, if ad-

Infants.

(*h*) One single instance occurs in the Rolls of Parliament of something like a reference to this jurisdiction in respect of a royal Will. In the 1st of Henry V. it is stated, that Henry IV. having made a Will, and appointed executors thereof, those executors, fearing the assets would be insufficient, declined to act. It is then recited that under these circumstances the effects would be *at the disposal of the Archbishop of Canterbury as Ordinary*, who should direct them to be sold. But Henry V., instead of allowing the effects to be sold, took to them, and agreed to pay their appraised value: 1 Add. 263; 4 Inst. 335. The only Will of a Sovereign deposited in the registry of the Prerogative Court is the Will of Henry VIII. That is understood to be a copy merely, and there is no appearance of any probate of it having been taken. It was probably deposited there for safe custody, or as a place of notoriety for such a purpose: 1 Add. 263.

(*i*) 1 Add. 262, 264, 265.

(*j*) *In the goods of his late Majesty George III.*, 3 Sw. & Tr. 199: see also *Ryves v. Duke of Wellington*, 9 B. 579.

judged competent, might make a valid Will of personal estate, a male at fourteen, a female at twelve years of age, but not at an earlier period. This was also the rule of the civil law (*k*). By reason, however, of sect. 11 of the same Act (*l*), which provides "that any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act," it has been held that a Will made since the Act by an infant soldier in actual military service is valid (*m*), also the Will of an infant seaman being at sea (*n*).

Idiots. An idiot, that is, a fool or madman from his nativity who never has any lucid intervals, is incapable of making a Will. Whether he is an idiot or not is clearly a question of fact (*o*).

Deaf and dumb. One who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making a Will; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means, and has a desire to make one, then he may by signs and tokens declare his testament (*p*). One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then in case he shall be able to write, he may with his own hand write his last Will and Testament (*q*). But

(*k*) *Smallwood v. Brickhouse*, 2 Mod. Cas. 195; *Re Smith's Estate*, 35 C. D. 589, 593.

(*l*) Extended by the Wills (Soldiers and Sailors) Act, 1918, s. 2. See *In the estate of Yates*, [1919] P. 93, *post*, Pt. I. Bk. II. Ch. II. § VI.

(*m*) *In the goods of Farquhar*, 4 Notes of Cases, 651, 652; *In the goods of Hiscock*, [1901] P. 78; but see *Re Wernher*, [1918] 1 Ch. 339.

(*n*) *Re McMurdo*, L. R. 1 P. & D. 540.

(*o*) 1 Hale, P. C. 29; Bac. Abr. Idiots, &c. A. 1; *Beverley's Case*, 4 Co. 124 b; Bac. Abr. Idiots, &c. A.; Swinb. Pt. 2, s. 4; 1 Hale, P. C. 29; Swinb. Pt. 4, s. 4, pl. 5, 7; Bac. Abr. Wills, B. 12.

(*p*) Swinb. Pt. 2, s. 4, pl. 2; Godolph. Pt. 1, c. 11; 4 Burn, E. L. 60. See also *Dickenson v. Blisset*, 1 Dick. 268; and the judgment of Wood, V.-C., in *Harrod v. Harrod*, 1 Kay & J. 4, 9. Where a testator, who was deaf and dumb, made his Will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a Will in conformity with such instructions, which was afterwards duly executed by the testator, the Court required an affidavit from the drawer of the Will, stating the nature of the signs and motions by which the instructions were communicated to him: *In the goods of Owston*, 2 Sw. & Tr. 461. *In the goods of Geale*, 3 Sw. & Tr. 431.

(*q*) Swinb. Pt. 2, s. 10, pl. 2; Godolph. Pt. 1, c. 11

if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, *i.e.*, if he have understanding he may make his testament by signs, otherwise not at all (*r*). Such as can speak and cannot hear, they may make their testaments, as if they could both speak and hear, whether that defect came by nature or otherwise (*s*). Such as be speechless only, and not void of hearing, if they can write, may very well make their testament themselves by writing: if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present (*t*).

A person who is incapable of speaking or writing owing to an apoplectic stroke and who can only assent to questions put to her by nods and pressure of the hand, can make a will by making a mark (*u*).

It is laid down in the old text books of the Ecclesiastical Law, that although he that is blind may make a nuncupative testament (*v*), by declaring his Will before a sufficient number of witnesses; yet that he cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last Will (*x*): and that, therefore, if a writing be delivered to the testator, and he not hearing the same read, acknowledged the same for his Will, this would not be sufficient; for it might be that if he should hear the same he would not own it (*y*). And the Civil Law expressly required that the Will should be read over to the testator, and approved by him, in the presence of all the subscribing witnesses. But in England this strictness is not required, and it is sufficient if there is satisfactory proof before the Court of the testator's knowledge and approval of the contents of the Will which he executed (*z*): and it is not necessary to produce

(*r*) *Ibid.*

(*s*) *Ibid.*

(*t*) Swinb. Pt. 2, s. 10, pl. 4; Godolph. Pt. 1, c. 11.

(*u*) *In the estate of Holtam*, 108 L. T. 732.

(*v*) See *post*, Chap. II. § VI., as to the restrictions on nuncupative Wills.

(*x*) Swinb. Pt. 2, s. 11; Godolph. Pt. 1, c. 11.

(*y*) *Ibid.* See also *Barton v. Robins*, 3 Phillim. 455, n. (*b*).

(*z*) 4 Burn, E. L. 60; Moore Paine, 2 Cas. temp. Lee, 595. See also *Re Axford*, 1 Sw. & Tr. 540. The single oath of the writer has been allowed sufficient by the Court of Delegates to prove the identity of the Will: *Ibid.*

evidence that the identical paper, which the testator executed as his Will, was ever read over to him (a).

Persons who
cannot read.

The same precautions that are necessary for authenticating a blind man's Will, seem requisite in the case of a person who cannot read. For though the law in other cases may presume, that the person who executes a Will knows and approves of the contents thereof; yet that presumption ceases, where by defect of education, or by reason of illness he cannot read the Will (b).

Lunatic.

A lunatic, that is, a person usually mad but having intervals of reason (c), during the time of his insanity cannot make a testament, nor dispose of anything by Will (d). But a Will is not revoked by the subsequent insanity of the testator (e).

If a party impeach the validity of a Will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs (f). The burthen of proof rests upon the person attempting to invalidate what, on its face, purports to be a legal act (g). Sanity will be presumed till the contrary is shown (h). Hence, if there is no evidence of insanity at the time of giving the instructions for a Will, the commission of suicide, three days after, will not invalidate the instrument by raising an inference of previous derangement (i).

Presumption
of sanity.

It must be borne in mind, that the presumption of sanity is not to be treated as a legal presumption, but, at the utmost, as a mixed presumption of law and fact (if not as a mere presumption of fact), that is, an inference to be made by a jury from the absence of evidence to show that the testator did not enjoy that soundness which experience shows to be the general condition of the human mind. If, therefore, a Will is produced before a jury and its execution proved, and no other evidence is

(a) *Fincham v. Edwards*, 3 Curt. 63; affirmed, 4 Moo. P. C. 198. See also *Longchamp v. Fish*, 2 Bos. & Pull. N. R. 415; *post*, Pt. I. Bk. iv. Ch. II. § v.

(b) 4 Burn, E. L., p. 61; *Barton v. Robins*, 3 Phillim. 455, n. (b). See *post*, Pt. I. Bk. iv. Ch. II. § v.

(c) *Beverley's Case*, 4 Co. 124 b.

(d) Swinb. Pt. 2, s. 3; Godolph. Pt. 1, c. 8, s. 2.

(e) Swinb. Pt. 11, s. 3, pl. 3; 4 Co. 61 b.

(f) The law seems unsettled as to how far, in cases of alleged unsoundness of mind, hereditary constitutional insanity may be pleaded: *Frere v. Peacocke*, 3 Curt. 664.

(g) 2 Phill. Ev. 293, 7th edit.

(h) *Groom v. Thomas*, 2 Hagg. 434.

(i) *Burrows v. Burrows*, 1 Hagg. 109. See also *Hoby v. Hoby*, 1 Hagg. 146.

offered, the jury would be properly told that they ought to find for the Will. And if the party opposing the Will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the Will. And in each case the presumption of competency would prevail. Still, the *onus probandi* lies, in every case, on the party relying on a Will, and he must satisfy the jury that it is the Will of a capable testator (*k*): and when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the Will is the Will of a competent testator, they ought not to affirm by their verdict that it is so. Accordingly, where, in an action by heir-at-law against devisees,—the question in issue being as to the capacity of the testator to make a Will,—the judge in his summing up told the jury “that the heir-at-law was entitled “to recover unless a Will was proved, but that, when a Will “was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; “and that the devisee must prevail, unless the heir-at-law “established the incompetency of the testator, and that if the “evidence was such as to make it a measuring cast, and leave “them in doubt, they ought to find for the defendants.” This was held to be a misdirection (*l*).

But where there is proof of the due execution of a Will by a testator who afterwards becomes insane, the onus of showing that it had been mutilated by the testator when of sound mind is on the party alleging the revocation (*m*).

If a lunatic person have clear or calm intermissions (usually called lucid intervals), then during the time of such quietness and freedom of mind he may make his testament, appointing executors, and disposing of his goods at pleasure (*n*). “If you can establish,” said Sir Wm. Wynne, in the case of *Cartwright v. Cartwright* (*o*), “that the party afflicted habitually by a

Will made during a lucid interval:

transfer in such case of *onus probandi*.

(*k*) And *à fortiori* when it appears that the testator was subject to delusions: *Smee v. Smee*, 5 P. D. 84. Approved in *Jenkins v. Morris*, 14 C. D. 674. And see *Hope v. Campbell*, [1899] A. C. 1.

(*l*) *Sutton v. Sadler*, 3 C. B. (N. S.) 87. See also Accord. *Symes v. Green*, 1 Sw. & Tr. 401; *Cleare v. Cleare*, L. R. 1 P. & D. 655, at p. 657.

(*m*) *Harris v. Berrall*, 1 Sw. & Tr. 153; *Allan v. Morrison*, [1900] A. C. 604, at pp. 610, 611. See also *post*, p. 28.

(*n*) Swinb. Pt. 2, s. 3, pl. 3; Godolph. Pt. 1, c. 8, s. 2; Wentw. c. 1, p. 33, 14th ed.; *Hall v. Warren*, 9 Ves. 610; *Rodd v. Lewis*, 2 Cas. temp. Lee, 176.

(*o*) 1 Phillim. Rep. 100. See the particulars of this case, *post*, p. 17.

malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this: it inverts the order of proof and of presumption; for until proof of an habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational; but where an habitual insanity of the mind of the person who does the act is established, there the party who would take advantage of an interval of reason must prove it" (p).

What is
sufficient
proof of a
lucid interval.

But although the law recognises acts done during such intervals as valid, yet it is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval (q); and such proof is matter of extreme difficulty, for this, among other reasons, viz., that the patient is, not unfrequently, rational to all outward appearance without any real abatement of his malady (r). On the other hand, if the deceased was subject to attacks producing temporary incapacity, and was at other times in full possession of his mental powers, such attacks may naturally create in those who only happen to see him when subject to them, a strong opinion of his permanent incapacity. These considerations, while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the Court to rely but little upon mere opinion, to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgments of others (s).

In *Ex parte Holyland* (t), Lord Eldon observed, that in the case of the *Attorney-General v. Parnter*, "Lord Thurlow

(p) See also the same doctrine laid down by Lord Thurlow in *Attorney-General v. Parnter*, 3 Bro. C. C. 443, and Sir W. Grant in *Hall v. Warren*, 9 Ves. 611. See also Swinb. Pt. 2, s. 3, pl. 7, where it is said, that if it be proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. See also Godolph. Pt. 1, c. 8, s. 2. But where the attesting witnesses, disinterested medical men, speak strongly to sanity, the Court will not set aside a Will on proof by interrogatories, but without plea, that the deceased many years before had been under an insane delusion: *Kemble v. Church*, 3 Hagg. 273.

(q) By Sir John Nicholl in *White v. Driver*, 1 Phillim. Rep. 88.

(r) By Sir John Nicholl in *Brogden v. Brown*, 2 Add. 445; and in *Ayrey v. Hill*, 2 Add. 210.

(s) By Sir John Nicholl in *Kindleside v. Harrison*, 2 Phillim. Rep. 459.

(t) 11 Ves. 11.

said that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property or with reference to such a case as this; for suppose the strongest mind reduced by the delirium of a fever or any other cause, to a very inferior degree of capacity, admitting of making a Will of personal estate (to which a boy of the age of fourteen is competent), the conclusion is not just that as that person is not what he had been, he should not be allowed to make a Will of personal estate." It must be observed that Sir W. Grant, in *Hall v. Warren* (u), does not appear to have understood Lord Thurlow in the same sense as Lord Eldon did in the preceding remarks, nor indeed does the report in *Brown of the Attorney-General v. Parnter* bear any such construction. "If general lunacy," said Sir W. Grant, "is established, they will be under the necessity of showing, according to the *Attorney-General v. Parnter*, that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the party soundly to judge of the act."

In the case of *Cartwright v. Cartwright* (x), it appeared that the testatrix was early in life afflicted with the disorder of her mind. She afterwards was supposed to be perfectly recovered, and continued for several years to conduct a house and establishment of her own as a rational person; but her habit and condition of body, and her manner for several months before the date of her Will, were those of a person afflicted with many of the worse symptoms of insanity, and continued so after making the Will. The survivor of the two persons present when she wrote the Will deposed that, in her opinion, the testatrix had not then sufficient capacity to be able to know what she did, and that during the time she was occupied in writing, which was upwards of an hour, she by her manner and gestures showed many signs of insanity. The Will was written in a remarkably fair hand, and without a blot or mistake in a single word or letter: *and it was a proper and natural Will, and conformable to what her affections were proved to be at the time, and her executors and trustees were very discreetly appointed.* Two months after this writing of the Will, in a conversation with the mother

Proof of lucid interval arising from the act of making a rational Will.

(u) 9 Ves. 611.

(x) 1 Phillim. 90.

of the parties benefited by the Will, the testatrix mentioned that she had made such a Will, and ordered her servant to bring it, and she then delivered it to the mother, observing that there was no need of witnesses as the estate was all personal, and the Will in her own handwriting. Sir Wm. Wynne pronounced the Will to be the legal Will of the deceased, and further said, that in his apprehension the forming of the plan, and pursuing and carrying it into effect with propriety and without assistance, would have been sufficient to have established an interval of reason if there had been no other evidence; but it was further affirmed, by the recognition and the delivery of the Will. From this sentence an appeal was interposed to the High Court of Delegates—who affirmed the judgment of Sir Wm. Wynne (*y*). That very eminent judge, in the course of giving sentence below, after remarking that the Court did not depend on the opinions of the witnesses, but on the facts to which they deposed, delivered the following observations:

“The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the Will. That I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act, rationally done (*z*). In my apprehension, where you are able completely to establish that, the law does not require you to go further; and the citation from Swinburne states it to be so. The manner he has laid it down is (it is in the part in which he treats of what persons may make a Will (*a*)): ‘The last

(*y*) 1 Phillim. 122.

(*z*) It is not, however, to be supposed that the learned judge here considers that every rational act rationally done is sufficient to prove a lucid interval. It is the particular manner in which the act was done in this case which leads the judge to the conclusion that there was a lucid interval: 2 Curt. 447, by Sir H. Jenner Fust, in *Chambers v. The Queen's Proctor*. In *Bannatyne v. Bannatyne*, 2 Roberts. 472, 501, Dr. Lushington, referring to the above passage in the judgment of Sir W. Wynne, said: “Though I cannot say I altogether agree to that *dictum*, still it is entitled to great weight, and, to a certain extent, a rational act done in a rational manner, though not, I think, ‘the strongest and best proof’ of a lucid interval, does contribute to the establishment of it.” See also the observations of Sir C. Cresswell, in *Nicholls v. Binns*, 1 Sw. & Tr. 239.

(*a*) Swinb. Pt. 2, s. 3, pl. 14.

observation is, If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his clear and calm intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably there must be a complete and absolute proof that the party who had so formed it did it without any assistance. If the fact be so, that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentleman could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact, that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient." Accordingly, Sir John Nicholl, in *Scruby v. Fordham* (b), lays it down as a general rule, that where a Will is traced into the hands of a testator, whose sanity is fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to the Will there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character, broadly taken, of his act (c).

In the case of *M'Adam v. Walker* (d), Lord Chancellor Eldon mentioned that he had been concerned as counsel, in a cause where a gentleman who had been for some time insane, and who had been confined till the hour of his death in a madhouse, had made a Will while so confined. The question was, whether he was of sound mind at the time of making this testament. It was a Will of large contents, proportioning the different provi-

(b) 1 Add. 90.

(c) See also *Chambers v. Queen's Proctor*, 2 Curt. 415, 451, Accord. See also the address of Sir C. Cresswell to the jury in *Nicholls v. Binns*, 1 Sw. & Tr. 239.

(d) 1 Dow. 178.

sions with the most prudent and proper care, with a due regard to what he had previously done to the objects of his bounty, and in every respect pursuant to what he had declared, before his malady, he intended to have done. It was held, that he was of sound mind at the time.

In the cases above stated, the act was not only done and completed by the testator himself, *but the Will was proper and natural*. In another case, *Clarke v. Lear and Scarwell (e)*, where the instrument, although written with great accuracy by the testator himself, was made in favour of a person to whom he had no good cause whatever to give a benefit, it was held that the act of framing such an instrument furnished no proof of the existence of a lucid interval. That was the case of a man who had been certainly disordered in his mind for a length of time. He went to Littlehampton to bathe in the sea, and there he saw a young woman at the house where he boarded, of whom he had no prior knowledge, and wanted to marry her, at a time when he was insane; and being brought to London in a strait waistcoat, he there wrote a paper, by way of codicil, giving her a legacy (f).

Distinction,
as to proof of
lucid interval
between
delirium and
insanity.

With respect to the comparative facility of proving a lucid interval, there is a great distinction to be observed, with respect to a case of delirium, set up in opposition to a Will, as contradistinguished from fixed mental derangement, or permanent proper insanity. The reason for this is given with peculiar force and precision of language, by Sir John Nicholl, in *Brogden v. Brown (g)*. "In cases of permanent proper insanity, the proof of a lucid interval is matter of extreme difficulty, as the Court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is not unfrequently rational to all outward appearance, without any real abatement of his malady: so that, in truth and substance, he is just as insane, in his apparently rational as he is in his visible raving fits. But the apparently rational intervals of persons,

(e) March, 1791, cited in 1 Phillim. 119, by Sir Wm. Wynne.

(f) See also the observations of Sir J. Nicholl, in *Evans v. Knight*, 1 Add. 237, 238; and for further cases as to the proof of the existence of lucid intervals, at the time of doing testamentary acts, see *Attorney-General v. Parnter*, 3 Bro. C. C. 441; *Coghlan v. Coghlan*, cited in 1 Phillim. 120; *Williams v. Goude*, 1 Hagg. 577; *Borlase v. Borlase*, 4 Notes of Cas. 106; and Lord Brougham's observations in *Waring v. Waring*, 6 Moo. P. C. 351.

(g) 2 Add. 445.

merely delirious, for the most part are really such. Delirium is a fluctuating state of mind, created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is, most commonly, really sane. Hence, as also, indeed, from their greater presumed frequency in most instances in cases of delirium, the probabilities, *à priori*, in favour of a lucid interval are infinitely stronger in a case of delirium, than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held by this Court" (h).

The great case of *Dew v. Clark* (i), which obtained the most complete and solemn consideration, led to a full investigation of that which has often been called "Partial Insanity," but which would, perhaps, be better described by the phrase "insanity, or unsoundness, always existing, although only occasionally manifest" (j). There the case pleaded by an only daughter in a responsive allegation, in the Prerogative Court, in opposition to her father's Will, was, that besides labouring under mental perversion in some other particulars, especially on religious subjects, the deceased had an *insane* aversion to his daughter, and was actuated solely by that illusion to dispose of his property in the manner in which it was purported to be conveyed by the contested Will. This allegation was opposed, as inadmissible, on behalf of residuary legatees named in the Will. But Sir John Nicholl admitted it; and after remarking that the case set up was one of partial insanity—of insanity *quod hoc*, upon a particular subject, or rather, perhaps *quod hanc*, as to a particular person,—and that the possible occurrence of such a case of partial insanity, and the consequent invalidity of a Will, which is fairly presumable to have been made under its operation, must be admitted on the authority of *Greenwood's Case* (k);

Partial
insanity.

Dew v. Clark.

(h) See also the observation of Dr. Lushington in *Dimes v. Dimes*, 10 Moo. P. C. 422, 426.

(i) 1 Add. 279; 3 Add. 79. See also Dr. Haggard's Report from the judge's notes.

(j) 6 Moo. P. C. 350, by Lord Brougham.

(k) The following statement of this case is to be found in Lord Erskine's speech on the trial of Hadfield: "The deceased, Mr. Greenwood, whilst insane took up an idea that his brother had administered poison to him, and this became the prominent feature of his insanity. In a few months, however, he recovered his senses, and returned to his profession, which was that of a barrister, &c., but could never divest his mind of the morbid delusion that his brother had attempted to poison him; under the influence of which (so said) he disinherited

the learned judge proceeded to observe, with respect to the daughter, "She must be apprised, however, as well that the burthen of proof rests with her, as that this burthen, in my judgment, is, from the very nature of the case, a pretty heavy one. The present, indeed, may be less difficult to make out than *Greenwood's Case*, in one respect, as the delusion under which the deceased is charged to have laboured towards the complainant is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject of religion; although here, as in *Greenwood's Case*, the general capacity is, in substance, unimpeached. But she must understand that no course of harsh treatment—no sudden bursts of violence—no display of unkind, or even unnatural feeling, merely, can avail in proof of her allegation—she can only prove it by making out a case of antipathy clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity" (l). After the evidence had been gone through on both sides, the same learned judge delivered his judgment: that the Will being proved to be the direct unqualified offspring (m) of a morbid delusion, as to the character and conduct of the daughter, being the very creature of that morbid delusion put into act and energy, the deceased must be considered insane at the time of making the Will, and consequently that the Will itself was null and void in law (n). In the course of his judgment the learned judge made the following remarks, on the subject of partial insanity: "It was said that 'partial insanity' was unknown to the law. The observation could only have arisen from mistaking the sense in which the Court used that term. It was not meant that a person could be partially insane and sane at the same moment of time: to

What is
meant by
partial
insanity.

him. On a trial in the Court of King's Bench upon an issue *devisavit vel non*, the jury found against the Will: but a contrary verdict was had in the Court of Common Pleas: and the suit ended in a compromise." See also Sir John Nicholl's statement of *Greenwood's Case*, 3 Add. 96, 97, and Lord Eldon's in *White v. Wilson*, 13 Ves. 89, and the summing up of Lord Kenyon in 3 Curt. Appendix, pp. i.—xxx.

(l) 1 Add. 284. See also *Fulleck v. Allinson*, 3 Hagg. 527.

(m) It must, however, be observed that the rule of law is that, in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound, the act is void. The law avoids every act of the lunatic *during the period of the lunacy*, although the act to be avoided cannot be connected with the influence of the insanity, and may be proper in itself: *Groom v. Thomas*, 2 Hagg. 436.

(n) 3 Add. 208. This judgment was afterwards confirmed by the Court of Delegates. A commission of review was then applied for before the Lord Chancellor, but refused. See 5 Russ. Chan. Cas. 163.

be sane, the mind must be perfectly sound; otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects. In that sense, the very same term is used by no less an authority than Lord Hale, who says, 'There is a partial insanity of mind and a total insanity. The former is either in respect to things *quod hoc vel illud insanire*. Some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications. Or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless, most persons that are felons of themselves, and others, are under a degree of partial insanity, when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes' (o).

These doctrines, and the subject of "Partial Insanity" (or, as it has been more usually called of late, "Monomania,") generally, were fully commented on and explained with great ability by Lord Brougham, in delivering the opinion of the Privy Council in *Waring v. Waring* (p). His Lordship, after demonstrating that no confidence can be placed in the acts, or any act, of a deceased mind, however apparently rational that act may appear to be, or may in reality be, proceeded to observe, that "we are wrong in speaking of partial unsoundness; we should say that the unsoundness always exists, but it requires a

(o) Dr. Haggard's Report from the judge's notes, pp. 11, 12. The Lord Chancellor (Lyndhurst), on refusing a commission of review, after commenting upon the judgment of Sir John Nicholl and reading the passage above cited in the text, continued: "I think, therefore, the learned judge has sufficiently explained what he meant by the occasional use of the term *partial insanity*; and with the explanation he has thus in terms given, and with the whole of his argument, and the illustrations he has used, and the cases to which he has referred in support of that argument, I confess I entirely agree."—5 Russ. Chanc. Cas. 166, 167.

(p) 6 Moo. P. C. 341.

reference to a peculiar topic, else it lurks and appears not. But the malady is there; and as the mind is one and the same it is really diseased, while apparently sound, and really its acts, whatever appearances they may put on, are only the acts of a morbid or unsound mind." Accordingly, it was an established principle of law, that to show unsoundness of mind it was not required that it should be general; it was sufficient if proved to exist on one or more points, though in all other respects the man might conduct himself with the utmost propriety (*q*). The case, however, of *Banks v. Goodfellow* (*r*) seems to establish that partial unsoundness not affecting the general faculties and not operating on the mind of a testator in regard to testamentary disposition will not be sufficient to deprive a person of the power of disposing of his property. But just as partial insanity does not necessarily negative testamentary capacity, so a man may be capable of transacting business of a complicated and important kind, involving the exercise of considerable powers of intellect, and yet may be the subject of delusions so as to be unfit to make a Will. The result would seem to be that a person subject to delusions may make a valid Will if the delusions under which he labours be such that they could not reasonably be supposed to have affected the dispositions made by the Will (*s*).

Case of a
Will "sound-
ing to folly."

Although in the case of a person who is sometimes sane, and sometimes insane, if there is no direct proof of his state when he wrote his Will, and there be in it a mixture of wisdom and folly, it is to be presumed that the same was made during the testator's phrenzy, even if there be but one word "sounding to folly" (*t*); yet the Court of Probate will not at once reject an

(*q*) *Fowles v. Davidson*, 6 Notes of Cas. 473, 474, by Sir H. Jenner Fust; *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

(*r*) L. R. 5 Q. B. 549, followed in *Boughton v. Knight*, L. R. 3 P. & D. 64.

(*s*) See Dr. Haggard's Report, from the judge's notes, pp. 5—10; *Dew v. Clark*, 1 Add. 279; and judgment of Sir John Nicholl, 3 Add. 79; *Wheeler v. Alderson*, 3 Hagg. 598; but see the observations of Sir H. Jenner Fust in *Chambers v. The Queen's Proctor*, 2 Curt. 448, 449; *Frere v. Peacocke*, 1 Robert. 444; *Austen v. Graham*, 8 Moo. P. C. 493; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232, 247 (as to the different kinds of insane delusions); *S. C.*, Dea. & Sw. 22; *Mudway v. Croft*, 3 Curt. 671 (as to the criteria by which to test and ascertain whether natural or innate eccentricity has exceeded the bounds of legal testamentary capacity); *Boughton v. Knight*, L. R. 3 P. & D. 64; followed *Smee v. Smee*, 5 P. D. 84; *Jenkins v. Morris*, 14 C. D. 674, 680. See also *Hope v. Campbell*, [1899] A. C. 1.

(*t*) Swinb. Pt. 2, s. 3, pl. 15. See *In the goods of Watts*, 1 Curt. 594.

allegation propounding a Will, which even strongly “sounds to folly,” when facts are pleaded, showing that the deceased up to his death conducted himself in the ordinary concerns of life as a sane man (u).

In a case where a woman made a Will, under a power authorising her to dispose of certain property by a Will attested by two witnesses, the Will was pronounced for, though both the witnesses deposed to the deceased’s incapacity (x).

The presumption of law is, that a verdict of a jury under a commission of lunacy, that the party, the subject of the commission, is of unsound mind, is well founded, and if the commission remained unsuperseded, that the party continued a lunatic to his death. Such presumption, however, may be rebutted and displaced by positive proof of entire recovery or possession of a lucid interval when a testamentary instrument was executed (y).

By the Roman law testaments might be set aside as being *inofficiosa*, deficient in natural duty, if they totally passed by (without assigning a true and sufficient reason) any of the children of the testator: though if the child had any legacy, however small, it was a proof the testator had not lost his memory or his reason, which otherwise the law presumed. But the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosa* to set aside such testament (z), and only requires that there should be satisfactory proof of the testator’s knowledge and approval of the contents of the Will (a).

Besides the two classes of persons *non compotes mentis* already mentioned, viz., idiots and lunatics, Lord Coke mentions two more classes, viz., those who were of good and sound memory, and by the visitation of God have lost it; and those who have become *non compotes* by their own act, as drunkards (b). In the former of these two latter classes must be reckoned those who, from sickness, grief, accident, or old age, have lost their reason, who are not like those classed by Lord Coke, as “*lunatici*,”

A Will may be pronounced for though both the attesting witnesses depose to the testator’s incapacity, because the Court disbelieved them on other evidence. Effect of commission of lunacy.

Inofficious testaments.

Persons who from old age or other causes have outlived their understanding.

(u) *Arbery v. Ashe*, 1 Hagg. 214.

(x) *Le Breton v. Fletcher*, 2 Hagg. 558; *S. P.* in *K. B.*, *Lowe v.*

(y) *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232, 239, 244, 245.

Jolliffe, 1 W. Bl. 365. See *Starnes v. Marten*, 1 Curt. 294.

(z) 2 Black. Comm. 503; *Wrench v. Murray*, 3 Curt. 623.

(a) See *post*, Pt. I. Bk. IV. Ch. II. § 5.

(b) 4 Co. 124, b.

sometimes having their understanding and sometimes not: but whose understandings are defunct; who have survived the period that Providence has assigned to the stability of their minds (c).

But old age alone does not deprive a man of the capacity of making a testament (d); for a man may freely make his testament how old soever he be; since it is not the integrity of the body, but of the mind, that is requisite in testaments. Yet if a man in his old age becomes a very child again in his understanding, or rather in the want thereof, or by reason of extreme old age, or other infirmity, he is become so forgetful that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic person (e).

"It is not necessary," observed Lord Chief Baron Eyre, in *Mountain v. Bennett* (f), "to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question, whether he was of a sound and disposing mind, memory and understanding. A man perhaps may not be insane, and yet not equal to the important act of disposing of his property by Will."

It is said by Lord Coke, in the *Marquis of Winchester's Case* (g), that it is not sufficient that the testator be of memory when he makes his Will to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason; and that is such a memory which the law calls sane and perfect memory (h). So it is laid down by Erskine, J., in

(c) *Ex parte Cranmer*, 12 Ves. 452, by Lord Erskine; *Sherwood v. Sanderson*, 19 Ves. 283. See also *Ridgway v. Darwin*, 8 Ves. 66.

(d) Swinb. Pt. 2, s. 5, pl. 1; Godolph. Pt. 1, c. 8, s. 4; *Bird v. Bird*, 2 Hagg. 142; *Lewis v. Pead*, 1 Ves. Jun. 19. Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the Court: *Kindleside v. Harrison*, 2 Phillim. 461, 462. And in cases where no insanity has either existed or been supposed to exist, the inquiry as to capacity simply is, whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done. But when lunacy or unsoundness of mind has previously existed, the investigation is of a totally different character: per Dr. Lushington, in *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 278; *Banks v. Goodfellow*, L. R. 5 Q. B. 549.

(e) Swinb. *ubi supra*; Godolph. *ubi supra*.

(f) 1 Cox, 356. See also *Combe's Case*, Moor, 759; Vin. Abr. tit. Devise, A. 22; 4 Burn, E. L. 49.

(g) 6 Co. 23 a; 4 Burn. E. L. 49.

(h) See further, *Herbert v. Lowins*, 1 Chanc. Rep. 24; Dyer, 27 a, in marg.; *Ball v. Mannin*, 3 Bligh, N. S. 1. See also the judgment of

delivering the opinion of the Judicial Committee of the Privy Council, in *Harwood v. Baker* (*i*), that in order to constitute a sound disposing mind the testator must not only be able to understand that he is by his Will giving the whole of his property to the objects of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from participation in that property (*k*).

On the other hand it must be observed, that mere *weakness* or infirmity of understanding is no objection to a man's disposing of his estate by Will; for Courts cannot measure the size of people's understandings and capacities; nor examine into the wisdom or prudence of men in disposing of their estates (*l*). "If a man," says Swinburne (*m*), "be of a mean understanding (neither of the wise sort or the foolish), but indifferent as it were, betwixt a wise man and a fool, yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *grossum caput*, a dull pate, or a dunce, such a one is not prohibited from making his testament" (*n*).

As to the last of the classes of *non compotes* mentioned by Lord Coke; "He that is overcome by drink," says Swinburne (*o*), "during the time of his drunkenness is compared to a madman (*p*), and therefore, if he make his testament at that time, it is void in law; which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his

Persons
drunk:

Sir John Nicholl in *Marsh v. Tyrrell*, 2 Hagg. 84, 122, as to the rules by which the competency of the mind must be judged. The case itself was compromised, and was reversed by consent: 3 Hagg. 471. And see further the judgment of the same learned judge in *Ingram v. Wyatt*, 1 Hagg. 401, where some valuable remarks on the subject of imbecility of mind will be found, although the case itself was reversed (3 Hagg. 466), not, however, on any point of law, but on a review of the evidence. For an instance where weakness of mind and forgetfulness will not constitute incapacity, see *Constable v. Tufnell*, 4 Hagg. 465: affirmed on appeal, 3 Knapp. 122; *Cockraft v. Rawles*, 4 Notes of Cas. 237.

(*i*) 3 Moo. P. C. C. 282, 290.

(*k*) See also *Sefton v. Hopwood*, 1 Fost. & F. 578; *Swinfen v. Swinfen*, 1 Fost. & F. 584.

(*l*) *Osmond v. Fitzroy*, 3 P. Wms. 129.

(*m*) Pt. 2, s. 4, pl. 3.

(*n*) See also *Harrod v. Harrod*, 1 Kay & J. 4.

(*o*) Pt. 2, s. 6.

(*p*) See *Gore v. Gibson*, 13 M. & W. 623.

habitual
drunkenness.

testament, being in that case" (q). In a case where it appeared that the testator was a person not properly insane or deranged, but habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects like a madman, it was held that as the testator was not under the excitement of liquor, he was not to be considered as insane at the time of making his Will; and the Will itself was accordingly established (r), and the Court pointed out the difference between the present case and one of actual insanity; inasmuch as insanity may often be *latent*, whereas there can scarcely be such a thing as latent ebriety; and consequently, in a case like the one under consideration, all which requires to be shown is, the absence of the excitement at the time of the act done; or at least the absence of excitement in any such degree as would vitiate the act done (s).

A Will
defaced by
the testator
while non
compos.

Onus of show-
ing sanity
at the time
of mutilation.

If a Will be executed by a testator of sound mind at the time of execution, and be afterwards wholly or partially defaced by him, while of unsound mind, such Will is to be pronounced for as it existed in its integral state, that being ascertainable (t). Accordingly, where a testatrix having duly executed her Will, subsequently became insane, and shortly before her death, it was discovered that the Will had been mutilated by her; but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity: it was held by Sir C. Cresswell that the *onus* of showing her to have been of sound mind when she mutilated it was on the party alleging the revocation (u).

Insanity
supervening
between the
instructions
for a Will and
its execution.
Effect of,
before the
Wills Act.

Before the Wills Act when signature was not essential to the execution of a Will questions used to arise as to mental incapacity supervening between instructions for a Will and its execution, and it was held that part of a Will might be established and part held not entitled to probate if actual incapacity were

(q) See also *Godolph.* Pt. 1, c. 8, s. 5.

(r) *Ayrey v. Hill*, 2 Add. 206. See also *Billinghurst v. Fickers*, 1 Phillim. 191; *Handley v. Stacey*, 1 Fost. & F. 574.

(s) 2 Add. 210. See also *Wheeler v. Alderson*, 3 Hagg. 602, 608; cf. *In the goods of Brassington*, [1902] P. 1. In the case of *Rex v. Wright*, 2 Burr. 1099, a rule was obtained to show cause why a criminal information could not be exhibited against certain persons, for a misdemeanour in using artifices, in order to obtain a Will from a woman addicted to, and almost destroyed by, liquor.

(t) *Scruby v. Fordham*, 1 Add. 74; *In the goods of Brand*, 3 Hagg. 754.

(u) *Harris v. Berrall*, 1 Sw. & Tr. 153; *Allan v. Morrison*, [1900] A. C. 604, at pp. 610, 611. See *ante*, p. 15.

shown at the time of the execution of the latter part (*v*). These questions, however, cannot now arise.

It was decided by the House of Lords in the great case of *Doe dem. Tatham v. Wright* (*x*), that letters written to the testator, and not acted upon, or indorsed, or answered by him, are not evidence of his sanity. Letters to testator not evidence of sanity.

Where there is a question as to the testamentary capacity of a testator, an executor propounding the Will does so at his own risk if he has the means of knowing the true state of mind of the deceased (*y*). Costs of executors.

SECTION II.

Persons Incapable from want of Liberty or Free-Will.

Persons intestable from want of liberty or freedom of will are, by the civil law, of various kinds, as prisoners, captives, and the like (*z*). But the law of England does not make such persons absolutely intestable, but only leaves it to the discretion of the Court to judge upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi* (*a*).

If it can be demonstrated that actual force was used to compel the testator to make the Will, there can be no doubt, that although all formalities have been complied with, and the party perfectly in his senses, yet such a Will can never stand (*b*). Will obtained by force :

So, if there were, at the time of bequeathing, a fear upon the testator, it could not be, as it ought, *libera voluntas* (*c*). Yet it must be understood, that "it is not every fear, or a vain fear that will have the effect of annulling the Will; but a just fear, that is, such as that indeed without it the testator had not made his testament at all, at least not in that manner (*d*). A vain fear is not enough to make a testament void; but it must be such a fear as the law intends when it expresses it by a fear that may *cadere in constantem virum* (*e*): as the fear of death, or of

(*v*) *Billinghurst v. Vickers*, 1 Phil. 187; *Wood v. Wood*, *ib.* 357.

(*x*) 4 Bing. N. C. 489.

(*y*) *Twist v. Tye*, [1902] P. 92; *Page v. Wilkinson*, 87 L. T. 146.

(*z*) Swinb. Pt. 2, s. 8; Godolph. Pt. 1, c. 9.

(*a*) 2 Black. Comm. 497.

(*b*) *Mountain v. Bennett*, 1 Cox, 355, by Eyre, C. B.

(*c*) Godolph. Pt. 3, c. 25, s. 8; Swinb. Pt. 7, s. 2, pl. 1.

(*d*) Godolph. Pt. 3, c. 25, s. 8.

(*e*) Godolph. Pt. 3, c. 25, s. 8; Swinb. Pt. 7, s. 2, pl. 7.

bodily hurt, or of imprisonment, or of loss of all or most part of one's goods, or the like (*f*): whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the person threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity and the like" (*g*).

by fraud:

Fraud is no less detestable in law than open force. Wherefore, when the testator is circumvented by fraud, the testament is of no more force than if he were constrained by fear (*h*). With regard to what deceit shall annul a testament on the ground of fraud, as in the case of a Will made under fear, it is left to the discretion of the judge, comparing the deceit to the capacity or understanding of the person deceived to discern whether it be such as may overthrow the testament or not (*i*). If a part of a Will has been obtained by fraud, probate, it should seem, ought to be refused as to that part, and granted as to the rest (*k*).

It was settled by the case of *Allen v. McPherson* (*l*) that a Will, whether of personal or real property, could not be set aside *in equity* on the ground that the Will was obtained by fraud and imposition; because a Will of personal estate might be annulled for fraud in the Court of Probate, and a Will of real estate might be set aside at law; for in such cases, as the *animus testandi* is wanting, it cannot be considered as a Will (*m*).

(*f*) Swinb. Pt. 7, s. 2, pl. 7.

(*g*) Swinb. Pt. 7, s. 2, pl. 7. See *Nelson v. Oldfield*, 2 Vern. 76.

(*h*) Swinb. Pt. 7, s. 3, pl. 1. Fraud and imposition upon weakness is a sufficient ground to set aside a Will of real, much more of personal estate, though such weakness is not sufficient to ground a commission of lunacy: by Lord Hardwicke, in *Lord Donegal's Case*, 2 Ves. Sen. 408.

(*i*) Swinb. Pt. 7, s. 3, pl. 3. See also the cases cited by Lord Lyndhurst, in *Allen v. McPherson*, 1 H. of L. 207, 208, of Wills obtained by false representations.

(*k*) *Allen v. McPherson*, 1 H. of L. 191; *Trimbletown v. D'Alton*, 1 Dow, N. S., stated *post*, p. 32.

(*l*) 1 H. L. 191. In some earlier cases we find the Court of Chancery distinctly asserting its jurisdiction to relieve against fraud in obtaining Wills, as in *Maundy v. Maundy*, 1 Ch. Rep. 123; in other cases, disclaiming such jurisdiction, though the fraud was gross and palpable, as in *Roberts v. Wynn*, 1 Ch. Rep. 236; and in other cases steering a middle course, by declaring the party who practised the fraud a trustee for the party prejudiced by it: *Herbert v. Louns*, 1 Ch. Rep. 22.

(*m*) As to how far the jurisdiction of the Probate Division is exclusive in respect of the grant or revocation of probate, see *post*, Pt. I. Bk. IV. Ch. I. § 1.

If a man (said Rolle, C.J., at a trial at bar) makes a Will in his sickness, by the over-importunity of his Wife, to the end he may be quiet, this shall be said to be a Will made by constraint, and shall not be a good Will (*n*). by importunity:

Importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act, no longer the act of the deceased, the free act of a capable testator; in order to invalidate the instrument (*o*).

A Will made by interrogatories is valid: but undoubtedly when a will is so made, the Court must be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case (*p*).

With respect to a Will obtained by influence, it is not unlawful for a man, by honest intercession and persuasion, to procure a Will in favour of himself or another person (*q*): neither is it to induce the testator, by fair and flattering speeches (*r*): for though persuasion may be employed to influence the dispositions in a Will, this does not amount to influence in the legal sense; and whether or not a capricious partiality has been shown, the Court will not inquire. But where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear (*s*). by influence.

The sort of influence which will invalidate a Will is thus described by Eyre, C.B., in *Mountain v. Bennett* (*t*): “There

(*n*) *Hacker v. Newborn*, Styles, 427. See also *Moneypenny v. Brown*, 8 Vin. Abr. 167, tit. Devise (Z 2), pl. 7; *Lamkin v. Babb*, 1 Cas. temp. Lee, 1.

(*o*) By Sir John Nicholl, in *Kindleside v. Harrison*, 2 Phillim. 551, 552.

(*p*) *Green v. Skipworth*, 1 Phillim. 58.

(*q*) Swinb. Pt. 2, s. 4, pl. 1. It is no part of the testamentary law of this country, that the making a Will *must originate* with a testator; nor is it required that proof should be given at the commencement of such a transaction, provided it be proved that the deceased completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition: by Sir J. Nicholl, in *Constable v. Tufnell*, 4 Hagg. 477; affirmed on appeal, 3 Knapp, 122.

(*r*) Swinb. Pt. 7, s. 4, pl. 1.

(*s*) By Sir Wm. Wynne, in *Dickinson v. Moss*, Prerog. T. 1790; MS. 4 Burn, 58, Tyrwhitt's Edit.

(*t*) 1 Cox, 355.

is another ground, which though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the Will; that is, if a dominion was acquired by any person over a mind of sufficient sanity *to general purposes*, and of sufficient soundness and discretion to regulate his affairs *in general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind."

But the influence to vitiate an act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear (*u*).

In two important cases, in the Prerogative Court, Wills made by persons of sufficient capacity, but of weak minds, have been set aside on the ground of improper influence. The Will, in one of these cases, was made in favour of the attorney and agent of the testator (*x*), in the other, by a wife in favour of her husband (*y*). And in another case in the House of Lords (*z*), on an appeal from the Irish Chancery, it was held, that where undue influence is exercised over the mind of the testator in making his Will, the provisions in the Will, in favour of the person exercising that influence, are void; but

(*u*) *Williams v. Goude*, 1 Hagg. 581; *Constable v. Tufnell*, 4 Hagg. 485; *Sefton v. Hopwood*, 1 Fost. & F. 578; *Lovett v. Lovett*, *ibid.* 581; *Hall v. Hall*, L. R. 1 P. & D. 481. As to undue influence, dependent on religious feelings, see *Norton v. Relly*, 2 Eden. 286; *Huquenin v. Baseley*, 14 Ves. 273; *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

(*x*) *Ingram v. Wyatt*, 1 Hagg. 94. The judgment of Sir J. Nicholl in this celebrated case was reversed by the Delegates (3 Hagg. 466); not, however, on any point of law, but on a view of the evidence of the cause. The correctness of Sir J. Nicholl's judgment, so far as regards his exposition of the law on the subject of improper influence, was recognised by the Judicial Committee of the Privy Council in the case of *Cockraft v. Rawles*, 4 Notes of Cas. 237. And see *ante*, p. 26, n. (*h*).

(*y*) *Marsh v. Tyrrell*, 2 Hagg. 84. In this case there was an appeal to the Delegates; but the case was afterwards compromised: 3 Hagg. 471.

(*z*) *Trimleston v. D'Alton*, 1 Dow. (New Series), 85.

the Will may be good, as far as respects other parties; so that a Will may be valid as to some parts, and invalid as to others; may be good as to one party, and bad as to another (a).

The subject of undue influence received full consideration in a case in the House of Lords (b), on which occasion Lord Cranworth made the following observations: "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a Will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who has thus led him astray, were to make a Will and leave to him everything he possessed, such a Will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property: Provided only, that in making such a Will, the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark, that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish.

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any

(a) See further, on this subject of influence, *Mynn v. Robinson*, 2 Hagg. 179; in which case Sir John Nicholl held that when the Will of a married woman, obtained while she was in an extremely weak state, nine days before death, by the active agency of the husband, the solo executor and universal legatee, wholly departed from a former Will, deliberately made a few months before, the presumption was strong against the act; and the evidence not being satisfactory, the Will was pronounced against, and the husband condemned in the costs.

(b) *Boyse v. Rossborough*, 6 H. L. C. 6, approved in *Baudains v. Richardson*, [1906] A. C. 169.

rule of law which would make it sufficient to vitiate a Will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a Will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his Will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a Will thus made may possibly be described as obtained by coercion. So as to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed; such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any Will executed under false impressions thus kept alive (c). It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud.”

After observing, that where it has been proved that a Will has been duly executed by a person of competent understanding and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it, his Lordship thus proceeded: “In order to set aside the Will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence: It must be shown that they are inconsistent with a contrary hypothesis. The undue influence must be an influence exercised in relation to the Will itself, not an influence in relation to other matters or transactions. But the principle must not be carried

(c) See accord. *Allen v. McPherson*, 1 H. of L. 207, per Lord Lyndhurst; *White v. White*, 2 Sw. & Tr. 505; in which last case Sir C. Cresswell held that a fraud of this kind could not be set up under a plea of undue influence.

too far. Where a jury sees that, at and near the time when the Will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the Will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the Will, that in regard to that also the same undue influence was exercised." To be undue influence in the eye of the law there must be coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence (d).

In the case of gifts or other transactions *inter vivos*, it is considered by Courts of Equity that the natural influence which relations such as those of solicitor and client, guardian and ward, physician and patient, tutor and pupil, involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment (e). The law regarding Wills is very different from this, and the mere proof of the existence of such a relation is no evidence of undue influence, and the party relying thereon must give some evidence of coercion or dominion exercised over the testator against his will or of coercion so strong that it could not be resisted (f).

Persons in fiduciary relation: distinction between gifts *inter vivos* and gifts by Will.

Persons in the sea service are frequently under the pressure of urgent wants, and to procure an immediate supply of those wants (such as an outfit, or the like) they will, without thought, comply with almost any condition proposed to them. These temporary necessities have been considered to operate on them as a sort of duress, on the part of those who are to furnish the supply: and it is partly on this consideration, that the policy of the law has been extended to guard the testamentary acts of this class of persons (g).

Wills of seamen:

(d) *Wingrove v. Wingrove*, 11 P. D. 81; *Baudains v. Richardson*, [1906] A. C. 169; *Craig v. Lamoureux*, [1920] A. C. 349.

(e) *Archer v. Hudson*, 7 Beav. 557.

(f) *Parfitt v. Lawless*, L. R. 2 P. & D. 462. See also *Ashwell v. Lomi*, reported in the note thereto.

(g) *Zacharias v. Collis*, 3 Phillim. 177.

made on the same instrument with a warrant of attorney invalid.

The statute 28 & 29 Vict. c. 72, s. 4 (*h*), provides, "that a Will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written on paper, parchment, or instrument with a power of attorney." By sect. 2 of the Act the term "seaman or marine" is defined to mean "a petty-officer or seaman, non-commissioned officer of marines or marine, or other person forming part, in any capacity, of the complement of any of Her Majesty's vessels, or otherwise belonging to Her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen." This statute superseded 11 Geo. 4 & 1 Wm. 4, and the earlier statutes of 9 & 10 Wm. 3, c. 41, s. 6, and 55 Geo. 3, c. 60, s. 4, containing similar language, on the construction of which, in *Craig v. Lester*, it was held that a Will was invalid, though executed on a different instrument from the power of attorney (*i*). This decision, although it may not have gone beyond the spirit of the Act, must, it would seem, be considered as a bold stretch of the words of it. The case of *Craig v. Lester* has, however, been followed by numerous others in the Prerogative Court, fully establishing, that Wills made by mariners as securities for debts are void. But neither the statute nor these decisions must be understood as making the relation of agent and seaman, or the circumstance of the seaman being indebted to his agent, an absolute defeasance to the Will, so that it could, in no case, be valid. The proper result to be deduced is, that when the relation of agent and seaman exists, there must be clear proof, not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect: that wherever it is executed *merely* as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by Will, the instrument shall be valid (*k*).

By sect. 12 of the Wills Act it was provided that that Act

(*h*) This Act has been amended by 60 Vict. c. 12; but the amending Act does not affect the provisions here set out.

(*i*) Delegates, 11th June, 1714, cited by Sir John Nicholl, in *Zacharias v. Collis*, 3 Phillim. 189.

(*k*) *Zacharias v. Collis*, 3 Phillim. 202, 203, 204. See also *Deardsley v. Fleming*, 2 Cas. temp. Lee, 98.

Wills of seamen made as security for debt, invalid.

should not affect any of the provisions of the Act 11 Geo. 4 & 1 Wm. 4. The Acts of 11 Geo. 4 & 1 Wm. 4 have been held to bind the Crown (*l*). These last-mentioned Acts and sect. 12 of the Wills Act have been repealed by the Act 28 & 29 Vict. c. 112, s. 1.

As regards merchant seamen, the Merchant Shipping Act, 1894, s. 177 (1) (*m*), which in effect re-enacts sect. 200 of the repealed statute, 17 & 18 Vict. c. 104, provides as follows, viz.:—

Merchant
seamen.

“(1.) Where a deceased seaman or apprentice has left a Will, the Board of Trade may refuse to pay or deliver the above-mentioned residue” [that is, the seaman’s property after deducting expenses]:

“(a) If the Will was made on board ship, to any person claiming under the Will, unless the Will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first or only mate of the ship, and

“(b) If the Will was not made on board ship, to any person claiming under the Will, and not being related to the testator by blood or marriage, unless the Will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, two witnesses, one of whom is a superintendent, or is a minister of religion officiating in the place in which the Will is made, or, where there are no such persons, a justice, British consular officer, or an officer of customs.

“(2.) Whenever the Board of Trade refuse under this section to pay or deliver the residue to a person claiming under a Will the residue shall be dealt with as if no Will had been made.”

Sect. 178 lays down certain rules to be observed by the Board of Trade with respect to creditors of deceased seamen and apprentices, with a view of making provision for payment of just claims by creditors, and for preventing fraudulent claims. By sect. 742 of this Act the term “seaman” includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship (*n*).

(*l*) *Re Bevan*, 14 W. R. 147.

(*m*) 57 & 58 Vict. c. 60.

(*n*) See further, as to these Acts and the provisions therein contained respectively as to Wills of seamen or marines and merchant seamen, *post*, Pt. I. Bk. IV. Ch. III. and Pt. I. Bk. V. Ch. II. § IV.

Secus, as to Wills of other persons.

Before passing of Married Women's Property Act *feme covert* generally incapable of making a Will:

The equity of these statutes cannot be extended beyond the Wills of mariners, so as to invalidate the Wills of other persons given to secure debts (*o*).

Before the passing of the Married Women's Property Acts, the capacity of a married woman to dispose of her real and personal estate by Will was practically limited to the disposition of property given or settled to her separate use or to the execution of a power of appointment, and it is still necessary to consider the law applicable to Wills of married women unaffected by these statutes.

A married woman was formerly utterly incapable of devising *lands* (being excepted out of the Statute of Wills, 34 & 35 Hen. VIII. c. 5), and as this incapacity to devise lands did not arise from her husband's interest in the property it would not be cured by his renunciation of interest (*p*). She was also incapable of making a testament of *chattels*, without the license of her husband; and such a Will, being considered a mere nullity, was not admitted to probate (*q*); for all her personal chattels were absolutely her husband's; and he might dispose of her chattels real, and had them to himself, if he survived her: it would therefore have been extremely inconsistent to have given her the power of defeating that provision of the law by bequeathing those chattels (*r*). The stat. 1 Vict. c. 26, made no alteration in the law with respect to the testamentary capacity of a *feme covert*; for by sect. 8, it was provided and enacted, that "no Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act." But this section does not exclude the Wills of married women from the operation of the 24th section (*s*), as to a Will speaking, as to the real and personal estate comprised in it, as if executed immediately before the testator's death. A married woman acquired no enlarged testamentary capacity from the Wills Act, although her last testamentary instrument or Will when made might have the benefit of more liberal rules of interpretation, and it was accordingly held that the Will of a married woman made during

(*o*) *Florance v. Florance*, 2 Cas. temp. Lee, 87.

(*p*) *Dye v. Dye*, 13 Q. B. D. 147.

(*q*) *Steadman v. Powell*, 1 Add. 58; *Bransby v. Haines*, 1 Cas. temp. Lee, 120; *Tucker v. Inman*, 4 M. & Gr. 1076.

(*r*) *Andrew Ognel's Case*, 4 Co. 51 b; 2 Black. Comm. 498.

(*s*) *Noble v. Phelps*, L. R. 2 P. & D. 276. See *post*, Pt. I. Bk. II. Ch. IV. § II.

coverture, who died in the lifetime of her husband, and who was at the date of the Will possessed of separate estate, and therefore then testable, was effectual without re-execution to pass separate property acquired by her subsequently to the date of her Will (*t*). But the 24th section does not speak from the death of a married woman so as retroactively to give effect to her Will made during coverture as to property acquired after the death of her husband (*u*); and it was held that this principle was untouched by the Married Women's Property Act, 1882, sect. 1 (sub-s. 1), on the ground that such sub-section applied only to a disposition by a married woman *during coverture* of property which she *then* had; and that consequently, notwithstanding sect. 24 of the Wills Act, her Will made during coverture was not, unless it was re-executed after she had become discovert, effectual to dispose of property which she acquired after the coverture had come to an end (*x*). Now, however, the Married Women's Property Act, 1893, sect. 3, provides that sect. 24 of the Wills Act shall apply to the Will of a married woman made during coverture whether she is or not possessed of separate property at the time of making it (*y*). This section of the Act of 1893 applies to Wills made before the Act of women dying after it (*z*).

The 27th section of the Wills Act, as to a general devise or bequest being an execution of a general power, also applies to Wills of married women (*a*).

Since the husband had no beneficial interest in the personal estate which the wife took in the character of executrix, and as the law permitted her to take upon herself that office, it enabled her, even before the Married Women's Property Act, 1882, if sole executrix, to make a Will in this instance, without the consent of her husband; restricted, however, to what she was entitled to as executrix (*b*). The effect of such a Will is merely to pass, by a pure right of representation to the testator the prior owner, such of his personal assets as remained outstanding,

except of
property to
which she was
entitled in
autre droit,
as executrix.

(*t*) *Thomas v. Jones*, 1 De G. J. & Sm. 63; *Re Bowen*, [1892] 2 Ch. 291.

(*u*) *Price v. Parker*, 16 Sim. 198, 202; *Willock v. Noble*, L. R. 7 H. L. 580, affirming *S. C.*, L. R. 8 Ch. 778.

(*x*) *Re Price*, 28 C. D. 709.

(*y*) *Re James*, [1910] 1 Ch. 157.

(*z*) *Re Wylic*, [1895] 2 Ch. 116. And see *post*, p. 49.

(*a*) *Thomas v. Jones*, 1 De G. J. & S. 63; *Noble v. Phelps*, L. R. 2 P. & D. 276.

(*b*) *Scammell v. Wilkinson*, 2 East, 552.

but no beneficial interest which the wife might have in any part of them could have been disposed of by her Will (c).

Husband
might assent
to his wife's
Will:

But the husband could waive the interest which the law gave him in his wife's personal property, and empower her to dispose of such property by Will. Thus a husband might assent to his wife's Will, and such assent entitled the wife's executor to claim such articles of her personal estate as would have been her husband's as her administrator (d), and it was not necessary that his assent should be given during her life; assent given after her death was sufficient (e).

he must
assent to the
particular
Will:

But in order thus to establish the Will, a general assent that the wife might make a Will was not sufficient; it should be shown that he had consented to the particular Will that she had made, and that he knew the contents (f), and his consent should have been given when it was proved (g). He might, therefore, revoke his consent at any time during his wife's life, or after her death before probate (h). But this consent might be implied from circumstances; and if *after* her death he acted upon the Will, or once agreed to it, he was not, it seems, at liberty to retract his assent, and oppose the probate (i). And when the Will was made in pursuance of an express agreement or consent, it was said that a little proof would be sufficient to make out the continuance of the consent after her death (k). The hus-

what was
sufficient
assent:

(c) *Hodsdon v. Lloyd*, 2 Bro. C. C. 534, 543.

(d) *Tucker v. Inman*, 4 M. & Gr. 1076. As to what such articles are, see *post*, Pt. II. Bk. III. Ch. I. § III.

(e) *Ex parte Fane*, 16 Sim. 406; *Elliott v. North*, [1901] 1 Ch. 424, 430.

(f) *Rex v. Bettesworth*, 2 Stra. 891; *Willock v. Noble*, L. R. 7 H. L. 580.

(g) *Henley v. Philips*, 2 Atk. 47.

(h) *Swinb.* Pt. 2, s. 9, pl. 10; 4 Burn. Ecc. L. 52; *Brook v. Turner*, 2 Mod. 170.

(i) *Brook v. Turner*, *ubi supra*. Accordingly, in *Maas v. Sheffield*, Prerog. M: T. 1845, 4 Notes of Cas. 350; *S. C.*, 1 Robert. 364, it was held by Sir H. Jenner Fust, that if, after the death of the wife, the husband does assent to a particular Will, he is bound by that assent. Where a wife made a Will, disposing of a fund over which she had a power, and also of a fund over which she had no power, and made her husband her executor, and he proved her Will generally, Sir L. Shadwell, V.-C., held that, as to the latter fund, the Will was valid, as being made *ex assensu viri*: *Ex parte Fane*, *ubi supra*. And in the case of a Will made by a married woman who appointed her husband an executor and he assented to the making of the Will, and after her death expressed his intention to take probate, but died before so doing without withdrawing his consent, it was held that he had assented to the Will: *In the goods of Cooper*, 6 P. D. 34.

(k) *Brook v. Turner*, 2 Mod. 173.

band's assent, however, does not affect the construction of the wife's Will or enlarge the words of disposition in the Will (*l*). And since the coming into operation of the amended rules 15 and 18 of the Probate Rules (Non-contentious Business), which provide that probate of the Will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's Will in general form is not deemed to have assented to the Will as a disposition of property which she had no right to dispose of by Will without his assent (*m*).

This assent on the part of the husband was no more than a waiver of his rights as his wife's administrator (*n*). It is in reality the sanction of the husband, surviving his wife, given to her Will by waiving his claim to all the property of the wife of which he is by the marriage purchaser, which gives validity to her Will. In *Noble v. Willock* (*o*), Lord Selborne says this: "What is the doctrine of law as to the husband's assent? As I understand all the authorities and all the cases, it means neither more nor less than this, that, as to all the property of the wife of which the husband is purchaser, which if reduced into possession during the marriage, becomes by law his, and which, if it remains not reduced into possession when the marriage is dissolved by the wife's death, becomes also by law his (subject indeed to the necessity of taking out administration to the wife); as to all this property, vested in him in his marital right, he may if he pleases waive his right, and so waive it as to give effect to a Will made by his wife during the coverture in derogation of his marital right." It could only give validity to the instrument, in the event of his being the survivor. Hence it follows, that if he died before his wife, her Will was void against her next of kin, so far as it derived its effect from his consent, and her personal property in possession other than her separate property was accounted the husband's property and passed to his representative, and her Will made during the coverture could not pass property bequeathed to her by her husband (*p*). Moreover, if a

husband's
assent only
available if
he survived.

(*l*) *Re Atkinson*, [1899] 2 Ch. 1, 5; affirming decision of *Stirling*, J., [1898] 1 Ch. 637; *Elliott v. North*, [1901] 1 Ch. 425, 434.

(*m*) *Re Atkinson*, *ubi supra*.

(*n*) *In the goods of Smith*, 1 Sw. & Tr. 127, per Sir C. Cresswell.

(*o*) L. R. 8 Ch. 778, 789. And see *Re Atkinson*, *ubi supra*, at p. 4.

(*p*) *Stevens v. Bagwell*, 15 Ves. 156; *Price v. Parker*, 16 Sim. 198; *In the goods of Rebecca Smith*, 1 Sw. & Tr. 125; *Noble v. Phelps*, L. R. 2 P. & D. 276—283; *Willock v. Noble*, L. R. 7 II. L. 580.

woman acquired any property after her husband's death, it could not pass by a Will made during her coverture, though by the consent of her husband: for at the time of making the Will she was intestable as to that property (*q*).

A widow might, prior to 1838, by recognition set up her Will made during coverture, or one made when a *feme sole*.

If the circumstances took place before the 1st of January, 1838 (and consequently the case did not fall within the operation of the stat. 1 Vict. c. 26), a widow after the death of her husband might, without any formal republication, recognize her Will of personal estate made during her coverture; and the instrument by such a recognition, operated as a new Will (*r*). So, a woman by recognition, without any formalities, might republish, during her widowhood, a Will of personal estate that she had made when a *feme sole*, and such Will was then equally valid, as to personalty, as if made in her widowhood (*s*). But by reason of the stat. 1 Vict. c. 26, s. 22, no such recognition made on or after the 1st January, 1838, can be effectual, notwithstanding the Will itself was made before that date (*t*).

Will of *feme covert* made in pursuance of agreement before marriage, or by virtue of a power: not available without probate: exercise of power over real property only: before the Land Transfer Act, 1897:

Concerning Wills of married women made under a power or in pursuance of an agreement amounting to a power (*u*), it is thought advisable to refer the reader to the Treatises on Powers, and not to enlarge this work by a discussion of the subject (*x*). It may, however, be remarked, that a testamentary appointment of such a nature by a married woman cannot be made available without probate (*y*). The Will of a married woman made during coverture, merely exercising a general power over *real property only*, was not, prior to the Land Transfer Act, 1897, entitled to probate though there was an appointment of executors (*z*). Where, however, a married woman having a power of appointment over real property executed the power in favour of herself, and afterwards made a Will directing that a portion of the property should be sold to pay legacies and erect a memorial window, it was held that as she possessed the pro-

(*q*) *Scammell v. Wilkinson*, 2 East, 566; Swinb. Pt. 2, s. 9, pl. 5; *Price v. Parker*, 16 Sim. 198, 202.

(*r*) *Miller v. Brown*, 2 Hagg. 209.

(*s*) *Long v. Aldred*, 3 Add. 48.

(*t*) See *post*, Pt. I. Bk. II. Ch. IV.

(*u*) *Tucker v. Inman*, 4 M. & Gr. 1077.

(*x*) As to the husband's right to administration, *ceterorum*, see *post*, Pt. I. Bk. IV. Ch. II. § VII.; Bk. V. Ch. II. § I.

(*y*) *Ross v. Ewer*, 3 Atk. 160; *Stone v. Forsyth*, Doug. 708; Sugden on Powers, 332, 4th edit.; *Tucker v. Inman*, 4 M. & Gr. 1049.

(*z*) *In the goods of Tomlinson*, 6 P. D. 209; *In the goods of Price*, 12 P. D. 137.

perty as separate estate, and had appointed an executor and directed him to pay the legacies, &c., and as the arrears of rent were part of her personal estate, the Will was entitled to probate (a). And the Court of Probate would allow such appointment to be proved without the husband's consent (the probate being limited to the property comprised in the power (b)) although its former practice was to require the husband's concurrence before it would admit the instrument to probate. So also the Will of a married woman dealing only with realty, but appointing executors, was entitled to probate where portion of the estate consisted of personalty vested in her by virtue of the Married Women's Property Act, 1882 (c). Now by sect. 1 (2) of the Land Transfer Act, 1897, it is provided that that Act shall apply to any real estate over which a person executes by Will a general power of appointment as if it were real estate vested in such person; and under sect. 1 (3) of the same Act, probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. The expression "real estate," however, in this part of the Act does not include copyhold or customary freehold where admission is necessary (d). Formerly the Court of Probate did not take upon itself to enter with any great minuteness into the construction of the powers under which Wills of this kind were executed, or as to the due compliance with their conditions. But according to the more modern practice, until the decision of the case of *Barnes v. Vincent* (hereafter mentioned), the Court of Probate considered itself bound to decide in the first instance, not only whether there was a power authorizing the testamentary act, but also whether the power had been duly executed, before it gave the instrument the sanction of its seal (e). Yet if the Court felt any real doubt on the point, it was always deemed the safer course to admit the paper to probate: inasmuch as the production of such a probate will not alone be sufficient to induce a Court of Equity to act upon it; for, with respect to other special circumstances which may be

probate might have been obtained of such a Will without the husband's consent.

Effect of the Land Transfer Act, 1897.

Jurisdiction of the Court of Probate as a Court of construction :

(a) *Brownrigg v. Pike*, 7 P. D. 61. And see *In the goods of Hornbuckle*, 15 P. D. 149.

(b) See *post*, Pt. I. Bk. IV. Ch. II. § VII.

(c) *In the goods of Cubbon*, 11 P. D. 169; *In the goods of Hornbuckle*, 15 P. D. 149. See also *Brownrigg v. Pike*, 7 P. D. 61; *Re Lambert's Estate*, 39 C. D. 626.

(d) Sect. 1, sub-sect. 4.

(e) *Allen v. Bradshaw*, 1 Curt. 110, 121.

Probate granted without any decision as to whether it is authorized by the power and its execution.

Jurisdiction of the Probate Division.

required to give the instrument effect as a valid appointment, *viz.*, attestation, sealing, &c., the Temporal Courts were never contented with the judgment of the Spiritual Court (*f*): whilst on the other hand, if the Spiritual Court rejected the paper, its decision was final; as the Court of Construction will not proceed to the consideration of the effect of any testamentary paper, till it has been proved in the Probate Court (*g*). If, however, the instrument has been admitted to probate, a Court of Equity, is precluded from questioning it *as a Will*; and the only office of that Court is to see that it has been duly executed and attested according to the power (*h*). In the case of *Barnes v. Vincent* (*i*), it was held by the Judicial Committee of the Privy Council (reversing the decision of the Prerogative Court of Canterbury) that the proper course for the Ecclesiastical Court was to grant probate wheresoever the paper professed to be made and executed under a power, and was made by one whose capacity and testamentary intention are clear, and no other objection occurs save those connected with the power (for example, no objection on the provisions of the Wills Act), and to leave the Court which has to deal with the rights under that instrument, to decide whether or not it is authorized by that power and by its execution. Their Lordships appear further to have been of opinion, that, on a power being alleged, the Ecclesiastical Court should grant probate, without going into any question as to the existence of the power. The decision in this case was declared by their Lordships to be a restoration of "the ancient and laudable practice" of the Ecclesiastical Court (*k*). The question as to the jurisdiction of the Probate Division and the limit in practice of its exercise (which is wholly different from the question of the jurisdiction and practice of the Ecclesiastical Courts and the Probate Court), came

(*f*) *Rich v. Cockell*, 9 Ves. 376; *Price v. Parker*, 16 Sim. 198.

(*g*) *Allen v. Bradshaw*, 1 Curt. 121, 122; *In the goods of Biggar*, 2 Curt. 336. See *post*, Pt I. Bk. IV. Ch. II. § IX. But see also *Goldsworthy v. Crossley*, 4 Hare, 140, 145.

(*h*) *Douglas v. Cooper*, 3 M. & K. 378; *Whicker v. Hume*, 7 H. of L. 124, 144. But see *Morgan v. Annis*, 3 De G. & Sm. 461.

(*i*) 4 Notes of Cas. Suppl. xxi.; *S. C.*, 5 Moo. P. C. 201.

(*k*) Where the Will of a married woman recited a power to bequeath certain property in case of her dying without issue, the Court refused to grant administration with the Will annexed to one of her children, but granted a general administration founded on an affidavit that the testatrix left no Will operative at law: *In the goods of Graham*, L. R. 2 P. & D. 385; *Noble v. Phelps*, L. R. 2 P. & D. 276.

before the Courts in the case of *In the goods of Tharp* (l) in which *Barnes v. Vincent* was commented on in the Court of Appeal, and it was pointed out that such case was decided at a time when the then Court of Probate, being an Ecclesiastical Court, was a Court of very limited jurisdiction, and could not decide the question of the sufficiency of the execution of the power, and also that since the passing of the Judicature Act every one of the Divisions of the High Court of Justice, and every judge, has now jurisdiction to do that which might be done by any other Division or any other judge. Thus in the present day it would seem that, in a case of a Will of a married woman under a power, it would not only be competent to, but also incumbent upon, the Probate Division, if the Court had all persons interested before it, to decide the question not only whether there was a power, but whether it was well executed (m). But this Court is in practice a Court of probate and not of construction. It should, generally speaking, only construe testamentary documents in so far as it is necessary to decide what documents are to be admitted to probate. Contracts and trusts are outside the jurisdiction in probate matters, and even if a trust were declared it would have to be administered in the Chancery Division (n). It is, however, sometimes necessary for the Probate Division to construe a Will in order to determine who is entitled to a grant of administration (o). It is to be observed that the Judicature Act has no effect upon the non-contentious branch of the jurisdiction of the Probate Division, and that no question of the enlargement of the jurisdiction existing in the Court can arise in the non-contentious business. It can only be when a suit has been instituted that any such question can arise (p).

Formerly where a Will was made by a married woman under a power, her executors took merely under the power which she was authorized to exercise by making a Will as to particular property. Consequently, the title of her executors did not extend beyond the property the subject of the power (q), and

Executors of the Will of a married woman made under a power.

(l) 3 P. D. 76.

(m) See also *In the goods of Gunn*, 9 P. D. at p. 244; *Attorney-General v. Lord Ailesbury*, 12 A. C. at p. 696; *In the goods of Walkeley*, 69 L. T. 419.

(n) *Re Heys, Walker & Gaskill*, [1914] P. 192.

(o) *In the estate of Lupton*, [1905] P. 321.

(p) *In the goods of Tomlinson*, 6 P. D. p. 210.

(q) *Tugman v. Hopkins*, 4 M. & Gr. 389; *O'Dwyer v. Geare*, 1 Sw. & Tr. 465.

Grant of probate under old practice to specify the power.

according to the old practice, in granting probate of a married woman's Will made by virtue of a power, or administration with such Will annexed, the power under which the Will purported to have been made must have been specified in the grant (*r*); but now, since the passing of the Married Women's Property Act, 1882, by rules 15 and 18 of the Probate Rules of April, 1887, it is provided that in the grant of probate of the Will of a married woman the probate shall take the form of ordinary grants without any exception or limitation, and general probate will be granted of the Will of a married woman made under a power and appointing executors (*s*). The effect of the general probate is only to enable the executor to get in all the assets of the wife, whether she had power to dispose of them by Will or not, and it does not affect the beneficial title to them (*t*). There are, however, still cases in which a limited grant will be made (*u*).

Will unduly obtained or unduly destroyed by marital authority.

It need hardly be observed, that if a Will of a married woman, made under a power, be obtained by the husband by undue influence and marital authority, contrary to her real wishes and intentions, such Will will not be admitted to probate (*x*). So if a wife have power to dispose of property by her Will, makes her Will, and afterwards destroys it by the compulsion of her husband, it may be established, upon satisfactory proof of its having been so destroyed, and also of its contents and execution (*y*).

Will of *feme covert* of property settled, or agreed to be settled, to her separate use:

Besides the case of a Will, made by a married woman by virtue of a power, there were, even before the Married Women's Property Act, other circumstances under which a Will made by her was valid without the assent of her husband, *viz.*, where property was actually given or settled, or was agreed to be given or settled, to the separate use of the wife. In such a

(*r*) Rule 15, 1862, P. R. (Non-Contentious Business). This rule was repealed in 1887: *Re Price*, 12 P. D. 137.

(*s*) *Re Severs*, 13 L. R. Ir. 1; *In the goods of Price*, 12 P. D. 137; *Smart v. Tranter*, 43 C. D. 587; *Re Lambert's Estate*, 39 C. D. 631.

(*t*) *Smart v. Tranter*, 43 C. D. 587.

(*u*) *In the goods of Donovan*, 78 L. T. 567; *In the goods of Leman*, [1898] P. 215; *In the goods of Tréfond*, [1899] P. 247, which case is commented on and explained in *In the goods of Vannini*, [1901] P. 330. Limited administration is also granted in the case of married women who have obtained a separation order or been judicially separated: *post*, p. 48.

(*x*) *Marsh v. Tyrrell*, 2 Hagg. 84; *Mynn v. Robinson*, 2 Hagg. 179. And see Pt. I. Bk. II. Ch. I. § II. *ante*, p. 33. n. (*a*).

(*y*) *Williams v. Baker*, Prerog. Trin. Term, 1839.

case it has been established, since the case of *Fettiplace v. Gorges* (z), that she may dispose of it as a *feme sole*, to the full extent of her interest, although no particular form to do so is prescribed in the instrument by which the settlement or agreement was made. The principle upon which that decision was founded is this: that when once the wife was permitted by a Court of Equity to take property to her separate use as a *feme sole*, she took it with all its privileges and incidents, one of which is the *jus disponendi* (a). And this rule prevails without regard to the circumstance, whether the property be in possession or reversion (b), and whether it be vested or contingent (c). And when she has such a power over the principal, it extends also to its produce and accretions, *e.g.*, the savings of her pin-money (d). Nor does it make any difference whether the property were given to trustees for the wife's separate use, or without the intervention of trustees, to the wife herself, for her own separate use and benefit (e); for in the latter case a Court of Equity would, if necessary, decree the husband to stand as a trustee to the separate use of the wife (f).

good, of
property in
reversion as
well as
possession :

extends to
accretions.

Even before the Married Women's Property Act, 1882, the Legislature had by statute given married women testamentary powers under special circumstances, for the Divorce Act (1857), 20 & 21 Vict. c. 85, s. 21, enacts that a wife who has obtained a protection order by reason of her husband having deserted her shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in like position in all

Statutory
testamentary
powers of
married
women prior
to Married
Women's
Property Act,
1882.

Will of *feme
covert* of

(z) 1 Ves. Jun. 46; *S. C.*, 3 Bro. C. C. 8.

(a) *Rich v. Cockell*, 9 Ves. 369. As to what before the Married Women's Property Act, 1882, was considered as such separate estate, see *Haddon v. Fladgate*, 1 Sw. & Tr. 48; *In the goods of Smith*, *ibid.* 125; *In the goods of Crofts*, L. R. 2 P. & D. 18. The old cases have, however, lost much of their importance since the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). See *post*, Pt. II. Bk. II. Ch. II. § III., where the general subject of the separate property of a widow as against her husband's executors is considered.

(b) *Sturgis v. Corp*, 13 Ves. 190.

(c) *Lechmere v. Brotheridge*, 32 Beav. 353.

(d) *Herbert v. Herbert*, Prec. Ch. 44; 1 Eq. Ca. Abr. 66, 68; *Fyfe v. Arbuthnot*, 3 Jur. N. S. 651; *Hughes v. Jones*, 32 L. J. Ch. 487; *Finlay v. Darling*, [1897] 1 Ch. 719; dissenting from *Re Bendy*, [1895] 1 Ch. 109. And see *Re Dowding's Settlement Trusts*, [1904] 1 Ch. 441, 446. Accordingly, she could dispose by Will, as against her husband, of the savings out of her alimony: *Moore v. Barber*, 34 L. J. Ch. 667; *coram* Stuart, V.-C.

(e) See the judgment of Sir John Nicholl, in *Braham v. Burchell*, 3 Add. 263.

(f) *Tappenden v. Walsh*, 1 Phillim. 352, and the authorities there cited.

property
acquired after
a protection
order :
after a
judicial
separation.

respects, with regard to property, as she would be if she had obtained a decree of judicial separation. And by sect. 25, referring to property acquired by the wife from the date of the sentence of judicial separation, it is provided that "such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead." Under these enactments a woman having been deserted by her husband obtained a protection order by reason of his desertion. On her death, in the life of her husband, intestate, the Court decreed letters of administration, limited to such personal property as she had acquired, or become possessed of, since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin (*g*).

Testamentary
powers of
married
women under
the Married
Women's
Property
Acts, 1882
and 1893.

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), expressly gives married women testamentary powers. The material sections of this Act are the following:—

Sect. 1 (sub-s. 1). "A married woman shall in accordance with the provisions of this Act (*h*) be capable of acquiring, holding, and *disposing by Will* or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee."

Sect. 2. "Every woman who marries *after the commencement of this Act*" (1 Jan., 1883) "shall be entitled to have and to hold as her separate property, and to *dispose of in manner aforesaid*" (*i.e.*, by Will or otherwise as if she were a *feme sole*), "all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or

(*g*) *In the goods of Worman*, 1 Sw. & Tr. 513. The requirement in the statute as to the entry of the protection order with the registrar is directory only: *In the goods of Faraday*, 2 Sw. & Tr. 369. As to the property to which the wife becomes entitled as executrix or administratrix since the sentence of separation or commencement of desertion, see stat. 21 & 22 Vict. c. 108, s. 7; *Bathe v. Bank of England*, 4 K. & J. 564; *post*, Pt. II. Bk. IV. Ch. II.

(*h*) That is to say, in the case of a woman married after the commencement of the Act, in accordance with sect. 2, of the property in that section mentioned; in the case of a woman married before the commencement of the Act, in accordance with sect. 5, of the property in that section mentioned: *Re Cuno*, 43 C. D. 12.

which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Sect. 4. "The execution of a general power by Will of a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Sect. 5. "Every woman married *before the commencement of this Act*" (1 Jan., 1883) "shall be entitled to have and to hold *and to dispose of in manner aforesaid*" (*i.e.*, by Will or otherwise as if she were a *feme sole*) "all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act (*i*), including any wages, earnings, money and property so gained or acquired by her as aforesaid" (*i.e.*, in sect. 2).

Sect. 23. "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she was living."

Sect. 3 of the amending Act of 1893 (56 & 57 Vict. c. 63) provides that "sect. 24 of the Wills Act, 1837, shall apply to the Will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such Will shall not require to be re-executed or republished after the death of her husband" (*k*).

If a *feme sole* makes her Will, and afterwards marries, such subsequent marriage is a revocation of the Will: and although she should survive the husband, a Will made before marriage will not revive upon his death, without a re-execution (*l*) thereof or execution of a codicil showing an intention to revive the same (*m*).

Will made by a wife before marriage.

A Will of a *feme covert*, made during coverture, in virtue of powers vested in her under her marriage settlement, does not require to be re-executed by her if she survives her husband (*n*).

Will made by wife during marriage in virtue of powers.

(*i*) Property, the title to which, whether vested, or contingent, in reversion, or remainder, is acquired before the commencement of the Act, does not come within this section though it falls into possession after the Act: *Reid v. Reid*, 31 C. D. 402; *Re Cuno*, 43 C. D. 17; *Re Bacon*, [1907] 1 Ch. 475.

(*k*) *Re James*, [1910] 1 Ch. 157; and see *ante*, p. 39.

(*l*) *Post*, Pt. I. Bk. II. Ch. III. § v.

(*m*) Wills Act, s. 22.

(*n*) *Morvan v. Thompson*, 3 Hagg. 239; *Trimmell v. Fell*, 16 Beav.

Where a married woman having power to appoint by Will "during coverture" made a Will during coverture in exercise of the power, the Will operated as a good exercise of the power notwithstanding that she died discover (o).

A woman whose husband is banished, or convict.

A woman whose husband is banished by Act of Parliament may make a Will, and act in every respect as a *feme sole* (p). So where a married woman, whose husband was a convict, made a Will, probate thereof was granted, on proof given that the property bequeathed was acquired by her subsequently to her husband's conviction, though he had received a conditional pardon from the governor of the colony whither he had been transported for life (q). And the Queen consort was an exception to the general rule; for she may dispose of her property by Will without the consent of her lord (r).

The Queen consort.

Will of married woman native of, and domiciled in, a foreign country.

Where a married woman was a native of Spain, and domiciled there, and it appeared, upon affidavit, that, by the law of Spain, she had full power and authority to bequeath, as a *feme sole*, the property she brought her husband on her marriage, probate was granted of her Will, made according to the law of that country (s).

SECTION III.

Persons incapable from their Criminal Conduct.

Traitors and felons.

Formerly traitors and felons were from their criminal conduct incapable of making Testaments from the time of their conviction: for then their goods and chattels were no longer at their own disposal, but forfeited to the King. This incapacity was not really a personal incapacity, but was occasioned by having no personal property to will by reason of the forfeiture thereof. As to lands, they were forfeited upon attainder, which took place only on judgment of death or outlawry, and not before; though goods and chattels were forfeited by conviction (t). If a convict, traitor, or felon obtained the King's

537, 541; *Bishop v. Wall*, 3 C. D. 194. See *Re James*, [1910] 1 Ch. 157.

(o) *Re Illingworth*, [1909] 2 Ch. 297.

(p) *Portland v. Prodgers*, 2 Vern. 104; *Compton v. Collinson*, 2 Bro. C. C. 335.

(q) *In the goods of Martin*, 2 Robert. 405; *In the goods of Coward*, 11 Jur. (N. S.) 569; *S. C.*, 34 L. J. P. M. & A. 120.

(r) 2 Black. Comm. 498. See *ante*, p. 10.

(s) *In the goods of Maraver*, 1 Hagg. 498. See *post*, Pt. I. Bk. IV. Ch. II. § VI.

(t) 2 Black. Comm. 499; *Swinb.* Pt. 2, ss. 12, 13; *Godolph.* Pt. 1,

pardon, and was thereby restored to his former estate, then he might make his Testament, as if he had not been convicted (*u*). And if he had goods as executor to another the same were not forfeited by conviction, whence it followed as to such goods he might make his Will (*x*).

Forfeiture of lands and goods for treason and felony was abolished by stat. 33 & 34 Vict. c. 23, and it would seem to follow that traitors and felons are no longer incapacitated from making Wills (*y*).

Neither could a *felo de se* dispose by Will of goods and chattels; for they were forfeited by the act and manner of his death (*z*); although he might make a devise of his lands, for they were not subjected to any forfeiture (*a*). But though the goods were forfeited so that the Will could not operate on them, it did not follow that he was incapable of making a Will and appointing an executor; and Sir C. Cresswell granted probate of the Will of a person who had been found *felo de se* by a coroner's inquest, acting on the well established distinction between the operative effect of a Will and its title to probate (*b*). Indeed, probate may have been requisite in such a case, not only for the purpose of passing property held by the deceased *in auter droit*, but also to enable the executor to exercise his undoubted right to traverse the inquisition (*c*). But now it would seem to follow from the above statute that a *felo de se* is no longer incapacitated from making a Will of goods and chattels.

Outlaws are incapable of making a Will (*d*), as long as the outlawry subsists; for their goods and chattels are forfeited during that time. Their lands are also forfeited, but only upon the judgment of outlawry, though the goods and chattels are

c. 12; Toller's Law of Executors, p. 11; *In the goods of Bailey*, 2 Sw. & Tr. 156; *Norris v. Chambres*, 7 Jur. N. S. 59.

(*u*) Swinb. Pt. 2, s. 12, pl. 3; Godolph. Pt. 1, c. 12, pl. 1.

(*x*) Godolph. Pt. 1, c. 12, s. 2; 4 Burn, Ecc. L. 61; *In the goods of Bailey*, 2 Sw. & Tr. 156.

(*y*) *Re Harris*, 19 C. D. 1.

(*z*) 2 Black. Comm. 499; Swinb. Pt. 2, s. 20; *Norris v. Chambres*, 7 Jur. N. S. 59.

(*a*) 3 Inst. 55; 4 Burn, Ecc. L. 62.

(*b*) *In the goods of Bailey*, 2 Sw. & Tr. 156.

(*c*) See *post*, Pt. II. Bk. III. Ch. IV., as to the executors or administrators of the deceased traversing an inquisition or presentment of *felo de se*.

(*d*) See stat. 33 & 34 Vict. c. 23, s. 1.

forfeited before final outlawry (e). But a man outlawed in a personal action might, it was said, in some cases make executors: for he might have debts upon contract which are not forfeited to the King: and those executors might have a Writ of Error to reverse the outlawry (f). Sect. 1 of 33 & 34 Vict. c. 23, provided that nothing in the Act should affect the law of forfeiture consequent on outlawry, but outlawry in civil proceedings was abolished by 42 & 43 Vict. c. 59, s. 3, and the testamentary incapacity consequent thereon to that extent ceased.

Persons ex-communicate.

Before the stat. 53 Geo. III. c. 127, there was some doubt whether an excommunicate person could make a Will (g); but, by that statute, excommunication is not to be pronounced, except in certain cases; and by sect. 3, in those cases, parties excommunicated shall incur no civil incapacity whatever. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making Testaments (as usurers, libellers, and others of a worse stamp), by the common law their Testaments are good (h).

Persons guilty of crimes short of felony.

(e) 2 Black. Comm. 499; Godolph. Pt. 1, c. 12, s. 8; Swinb. Pt. 2, s. 21, pl. 4. But it seemeth that he who is outlawed in an action personal may make his testament of his lands; for they are not forfeited: Swinb. Pt. 2, s. 21, pl. 7.

(f) *Shaw v. Cutteris*, Cro. Eliz. 851; 4 Burn's Ecc. L. 62; Wentw. c. 1, p. 37, 14th edit.

(g) Swinb. Pt. 2, s. 22; Wentw. c. 1, p. 38; 4 Burn's Ecc. L. 62.

(h) 2 Black. Comm. 499.

CHAPTER THE SECOND.

THE FORM AND MANNER OF MAKING A WILL OR CODICIL.

BEFORE the passing of the Wills Act (1 Vict. c. 26), no solemnities of any kind were necessary for the making of a Will of personal estate. The fifth section of the Statute of Frauds, which required the formalities of signature and attestation by three or four witnesses for a devise of lands, did not extend to Wills of personal property. The nineteenth section of the Statute of Frauds made it necessary that Wills of personal estate should, generally speaking, be reduced *into writing* in the testator's lifetime; inasmuch as it was thereby enacted, that no nuncupative Will (where the estate thereby bequeathed exceeded the value of 30*l.*) should be good, except under certain circumstances which will be hereafter pointed out (*a*). But no other formality whatever was necessary to give Wills of personal estate effect and operation. Whence it often happened that a Will, intending to dispose of both real and personal estate, was inoperative as to the former, and at the same time a perfect disposition of the latter.

The Wills Act repealed the Statute of Frauds (*viz.*, sects. 5, 1 Vict. c. 26. 6, 12, 19, 20, 21, 22, and 23), so far as relates to Wills made after the 31st of December, 1837, and contains enactments, the result of which is, that, on or after the first day of January, 1838, the solemnities prescribed by the Wills Act are required to render valid any Will or other testamentary disposition of every description of property without distinction; so that the same formalities of execution and attestation are necessary, whether the instrument disposes of real or personal estate.

These enactments are contained in sects. 9, 11 and 13 of the Wills Act.

It must, however, be observed, that this statute does not extend to any Will made before the 1st day of January, 1838 (*b*). As to the law with respect to Wills made at an

The statute does not extend to Wills made before Jan. 1, 1838.

(*a*) *Post*, § VI.

(*b*) But every Will re-executed or republished or revived by any

earlier date, see the earlier Editions of this Work, Pt. I. Bk. II. Ch. II.

Presumption
as to the time
when a Will
without date
was made.

It may here be remarked, that where a Will without date is properly executed according to the former law, but not executed pursuant to the new Act, and the case is altogether bare of circumstances which can afford the Court any information as to the time when the Will was made, it has been held, that the presumption is, that it was made before the Act came into operation; inasmuch as every one is presumed to know the law, and the Court, in the absence of evidence tending to a contrary conclusion, is bound to presume that the Will was executed according to the law as it stood at the time the instrument was written (*c*).

SECTION I.

The Signature by the Testator.

Signature of
Wills made
after Jan. 1,
1838:
1 Vict. c. 26,
s. 9:

With respect to the signature of a Will, made (or re-executed or republished) (*d*) on or after the 1st day of January, 1838 (*e*), it is required by the stat. 1 Vict. c. 26, s. 9, that it "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction."

signature by
mark suffi-
cient.

It seems clear that the making of a mark by the testator is a sufficient signing to satisfy the statute. It was held by the Court of Queen's Bench, in *Baker v. Dening* (*f*), that under the Statute of Frauds (s. 6), the making of a mark by a deviser, to a Will of real estate, is a sufficient signing; *and that is sufficient without reference to any question whether he could write at the time.*

So, in *Wilson v. Beddard* (*g*), on the trial of an issue *devisavit vel non*, directed by the Court of Chancery, Parke, B., said, that it was necessary, under that statute, that the Will should be signed by the testator, but not with his name, for

codicil is, for the purposes of the Act, to be deemed to have been made at the time the same was so re-executed, republished, or revived (sect. 34).

(*c*) *Pechell v. Jenkinson*, 2 Curt. 273. As to the presumption in the case of *alterations* appearing on the face of a Will, see *post*, Pt. I. Bk. II. Ch. III. § 1.

(*d*) See *supra*, p. 53, note (*b*).

(*e*) For a statement of the Law and authorities as to Wills made prior to this date, see the earlier Editions of this Work: Pt. I. Bk. II. Ch. II. § 1.

(*f*) 8 A. & E. 94.

(*g*) 12 Sim. 28.

his mark was sufficient if made by his hand though that hand was guided by another person; and Sir L. Shadwell, V.-C., afterwards held, that this proposition was correct.

These decisions appear to be equally applicable to the statute of Victoria as to the Statute of Frauds, for the language of both Acts in this respect is almost identical, the words of the latter being that all devises and bequests of lands shall be in "writing and signed by the party so devising the same or by some other person in his presence and by his express directions, &c." (*h*). Accordingly it has been held in the construction of the statute of Victoria, that when, in the testator's presence, and by his directions, another person stamped the Will, by way of signature, with an instrument on which the testator had had his usual signature engraved, so that it might be stamped on letters or other documents requiring his signature, this was a due execution of the Will (*i*).

Again, Wills have been admitted to probate which have been signed by the testator under an assumed name, the Court being of opinion that such assumed name might stand for, and pass as, the *mark* of the testator (*k*).

Signature under an assumed name.

In the construction of the Statute of Frauds, it was once considered that the putting of a seal by the testator was a

Sealing not a sufficient signature.

(*h*) See *Accord. In the goods of Bryce*, 2 Curt. 325; in which case a Will made since Jan. 1, 1838, was admitted to probate, on motion, the testatrix having signed it with a mark, and notwithstanding her name did not appear on the face of the instrument. See also *In the goods of Amiss*, 2 Robert. 116, *post*, p. 69. So where one Thomas Douce put his mark to a testamentary paper in which he was described throughout as *John Douce*, the Court, on being satisfied on affidavit that Thomas Douce duly executed the paper, granted probate thereof as his Will: *In the goods of Douce*, 2 Sw. & Tr. 593. Again, where there was no doubt of the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it: *In the goods of Clarke*, 1 Sw. & Tr. 22. But where the deceased, who resided with her sister, prepared two Wills for their respective execution, the legacies in each and the disposition of the residue being almost identical, and by mistake executed the Will prepared for her sister, the Court held that the deceased did not know and approve of the contents of the document she executed, and refused probate of it: *In the goods of Hunt*, L. R. 3 P. & D. 250; *In the estate of Meyer*, [1908] P. 353.

(*i*) *Jenkins v. Gaisford*, 3 Sw. & Tr. 93. And see *In the goods of Emerson*, 9 L. R. Ir. 443, in which case it was held that the affixing to a Will of a seal stamped with his initials by a testator, who placed his finger on the impression made by the seal and said, "this is my hand and seal," was sufficient execution.

(*k*) *In the goods of Glover*, 5 Notes of Cas. 553; *In the goods of Redding*, 2 Robert. 339.

sufficient signing; for that *signum* was no more than a mark, and sealing is a sufficient mark that it is his Will (l).

But this doctrine has been since overruled (m). Whence it appears to follow, that sealing would not be regarded as a signing within the statute of Victoria.

The signature under the Wills Act is required to be at the foot or end.

The Will is required by that Act to be signed "*at the foot or end thereof.*" The Statute of Frauds merely requires that the Will shall be "signed;" and it was held, that a Will in the testator's own handwriting commencing, "I, John Styles, do declare this to be my last Will, &c." was sufficiently "signed" within that statute, although not subscribed with his name (n). With a view, perhaps, to prevent future controversy, as to whether a Will so signed is a complete and perfect instrument, the statute of Victoria required that the signature of the testator shall be at the foot or end of the Will.

But questions of this kind were found not to be altogether excluded by the operation of this enactment: And a new ground of contest arose out of it, as to what may be considered a signing of the Will at the end or foot thereof.

Doubts arose whether a signature by the testator in the body of the *testimonium* or attestation clause was sufficient; and also, whether a signature below the latter clause, when it runs beneath the conclusion of the Will, was a compliance with the Act. On the question, whether the Will was well executed, if there was a blank space between the conclusion of the Will and the signature of the testator, a lamentably large number of points and decisions occurred. In the earlier cases Sir H. Jenner Fust put a very liberal construction on this part of the Act. But afterwards that learned judge, in concurrence with the Judicial Committee of the Privy Council (o), felt it necessary to take a more rigid view of this enactment, on the ground that it was intended to prevent any addition being made to the Will after the deceased had executed it. And accordingly probate was refused in a great number of subse-

(l) *Lemayne v. Stanley*, 3 Lev. 1.

(m) *Smith v. Evans*, 1 Wils. 313; *Wright v. Wakeford*, 17 Ves. at p. 459. And cf. *In the goods of Emerson*, 9 L. R. Ir. 443, ante, p. 55, n. (i).

(n) *Coles v. Trecothick*, 9 Ves. 249.

(o) *Willis v. Lowe*, 5 Notes of Cas. 428; *S. C.*, 1 Robert. 618, note (b); *Smee v. Bryer*, 6 Notes of Cas. 20, Suppl. xii.; *S. C.*, 1 Robert. 616; 6 Moo. B. C. 404.

quent cases on this objection, and the intention of a great many testators unfortunately defeated.

This led to the passing of the stat. 15 Vict. c. 24, which, after reciting that, by the stat. 1 Vict. c. 26, it had been enacted that no Will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, proceeds to enact, by sect. 1, that "every Will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite (*p*) to the end of the Will (*q*), that it shall be apparent

Stat. 15 Vict.
c. 24.

When
signature to a
Will shall be
deemed valid.

(*p*) A signature written crossways on the second page of a paper, on the first and third pages of which the Will was written, was held sufficient: *In the goods of Powell*, 4 Sw. & Tr. 34. Where the testator's signature was written partly across the last line but one of the Will, and entirely above the last line, with the exception of one letter which touched the last line, it was held that the Will was signed at the foot or end thereof: *In the goods of Woodley*, 3 Sw. & Tr. 429. The same was held under the stat. 15 Vict. c. 24, of a Will made in France, and signed not at the end of the Will, but at the end of a notarial minute which followed in the same sheet: *Page v. Donovan*, Dea. & Sw. 278. A signature at the end of several sheets of the Will except the last has been held insufficient, the signature not being at the end of the Will: *Sweetland v. Sweetland*, 4 Sw. & Tr. 6. A Will ended on the second page of a folded sheet of paper, and the rest of the page was in blank. The attestation clause and signatures of the testator and the attesting witnesses were written on the third page: the signature of the testator being opposite the clause appointing executors, the attestation clause being written beneath the signatures and ending opposite to the concluding words of the Will, and the signatures of the attesting witnesses being at the bottom of the attestation clause: It was held that the signature was so placed beside or opposite to the end of the Will that it was apparent on the face of the Will that the testator intended to give effect by his signature to the writing as his Will, and that the Will was therefore entitled to probate: *In the goods of Williams*, L. R. 1 P. & D. 4. A Will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of the testator and attesting witnesses, which were written crossways on the second page. It was held that the Will was duly executed: *In the goods of Coombs*, L. R. 1 P. & D. 302. Where in a testamentary paper executed by the deceased the last sentence com-

(*q*) Where a Will was written on a piece of parchment, and at one corner at the bottom of the parchment a piece of paper was pasted, and a stamp impressed on it, upon which paper the signatures of the testator and the attesting witnesses were subsequently made; it was held that the signature must be accepted as a signature on part of the Will, so as to be within the stat. 15 Vict. c. 24: *In the goods of Gausden*, 2 Sw. & Tr. 362; followed in *Cook v. Lambert*, 3 Sw. & Tr. 46. And see *In the goods of Horsford*, L. R. 3 P. & D. 211.

Stat. 15 Vict.
c. 24.

on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will, and that no such Will shall be affected by the circumstance that the signature shall not follow nor be immediately after the foot or end of the Will, or by the circumstance that a blank space shall intervene between the concluding word of the Will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause or of the clause of attestation (r), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses (s), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the

menced immediately above the signature of the deceased, and was continued in three short lines to the left of it, the two last lines being somewhat below the signature, and this sentence was written before the deceased signed her name, it was held that the execution was valid, and that the last sentence should be included in the probate: *In the goods of Ainsworth*, L. R. 2 P. & D. 151. A duly attested signature on the earlier pages of a Will has been held insufficient in cases where an unattested signature appeared on later pages: *In the goods of Dilkes*, L. R. 3 P. & D. 164; *Phipps v. Hale*, L. R. 3 P. & D. 166. A mark made on his deathbed by a paralyzed man in the middle of a testamentary paper duly witnessed was held *insufficient*: *Margary v. Robinson*, 12 P. D. 8. A codicil on the third sheet of a duly executed Will executed by the signature of the testator and attesting witnesses in the margin of the first sheet of the Will was held *insufficient*: *In the goods of Hughes*, 12 P. D. 107; *In the goods of Fuller*, [1892] P. 377; *Royle v. Harris*, [1895] P. 163.

(r) In the following cases the Court, being satisfied that the deceased intended by signing his name in the attestation clause to execute his Will, granted probate: *In the goods of Walker*, 2 Sw. & Tr. 354; *In the goods of Casmore*, L. R. 1 P. & D. 653; *In the goods of Huckvale*, L. R. 1 P. & D. 375; *In the goods of Pearn*, 1 P. D. 70. The Court will in some cases presume that the testator has signed his name prior to the attestation, although there be no direct proof of that fact: *In the goods of Huckvale*, L. R. 1 P. & D. 375; *In the goods of Pearn*, 1 P. D. 70. Where the Will had an imperfect attestation clause, and the name of the deceased appeared written beneath the signatures of the attesting witnesses, and the witnesses were both dead, and no evidence could be given as to the order in which the signatures were made, the Court nevertheless decreed probate of the Will: *In the goods of Puddephatt*, L. R. 2 P. & D. 97; *In the goods of Peverett*, [1902] P. 205; and see *In the goods of Jones*, 46 L. J. P. & M. 80. Where the Will was in the handwriting of the testator and his name formed the concluding words of the last clause of the Will, it was admitted to probate, the Court (Sir C. Cresswell) being satisfied that the name was intended to be a signature: *Trott v. Skidmore*, 2 Sw. & Tr. 12. As to what the Act means by "among the words of the testimonium clause," see *In the goods of Mann*, 28 L. J. P. M. & A. 50.

(s) *In the goods of Jones*, 4 Sw. & Tr. 1.

Will whereon no clause or paragraph or disposing part of the Will shall be written above the signature (*t*), or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the Will is written to contain the signature (*u*): and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath (*x*), or which follows it (*y*), nor shall it give effect to

(*t*) *In the goods of Williams*, L. R. 1 P. & D. 4; *Hunt v. Hunt*, L. R. 1 P. & D. 209; *In the goods of Jones*, 4 Sw. & Tr. 1; *In the goods of Wright*, 4 Sw. & Tr. 35.

(*u*) A Will was written across the second and third sides of a sheet of note-paper, the lower part of such sides being left blank, the attestation clause and signatures of the testator and witnesses were written at the back of the Will across the top of the first and fourth sides of the paper. The testator wrote the Will in the presence of the witnesses immediately before he executed it. The Court, being satisfied that the paper was written before the signatures were put there, granted probate (distinguishing the case from *In the goods of Hammond*, 3 Sw. & Tr. 90, in which there was no evidence of the paper being written before the signatures): *In the goods of Archer*, L. R. 2 P. & D. 252.

(*x*) A Will contained a reference to "executors hereafter named," but did not appoint executors. A clause appointing executors was written immediately underneath the testator's signature. It was held that this clause being underneath the signature, the probate must go without it: *In the goods of Dallow*, L. R. 1 P. & D. 189. Where from the obvious sequence and sense of the context it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate; *In the goods of Kimpton*, 3 Sw. & Tr. 427. A Will was written on the second and third sides of a sheet of foolscap, on the first side of which there was a lithographed form of Will. The deceased signed her name in the presence of witnesses at the foot of the lithographed form, and it was held that the first page might be treated as the last page of the Will, and that the paper was entitled to probate: *In the goods of Wotton*, L. R. 3 P. & D. 159; *Re Madden*, [1905] 2 Ir. R. 614; but see *Royle v. Harris*, [1895] P. 163; and see *In the goods of White*, [1896] 1 Ir. 296; *In the goods of Birt*, L. R. 2 P. D. 214. See also *In the goods of Malen*, 54 L. J. P. & M. 91; *In the goods of Greenwood*, [1892] P. 7. See *post*, Alterations and Interlineations, Pt. I. Bk. II. Ch. III. § 1.

(*y*) In order to get rid of the objection that the Will was not signed at the foot or end, the Court has formerly, in some cases, thought itself justified in regarding a portion running below the signature as forming no part of the Will, and granting probate exclusive of that portion: *Keating v. Brooks*, 4 Notes of Cas. 253, 260. But in *Sweetland v. Sweetland*, 4 Sw. & Tr. 6, it is laid down that "the Court would not be justified in fixing upon a signature in the midst of what the testator intended as his Will, and treating it as an execution of all

any disposition or direction inserted after the signature shall be made" (z).

Stat. 15 Vict.
c. 24.

Act to extend
to certain
Wills already
made.

Sect. 2. "The provisions of this Act shall extend and be applied to every Will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such Will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such Will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the Will, by a Court of competent jurisdiction, in consequence of the defective execution of such Will."

Interpreta-
tion of
"Will."

Sect. 3. "The word 'Will' shall, in the construction of this Act, be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of Her Majesty Queen Victoria."

Short title
of Act.

Sect. 4. "This Act may be cited as 'The Wills Act Amendment Act, 1852.'"

Blank spaces
in the body of
a Will are
unobjection-
able.

It should be observed that there is no provision in either of these Acts that the Will shall be written continuously. Therefore it has been held that if a Will is otherwise duly executed, it is no objection that it contains blank spaces in the body of it (a).

that preceded, and granting probate of so much of the Will to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes. It does not become the Court in a laudable anxiety to give effect to the document to twist or distort the plain meaning of the statute by ingenious construction, and virtually break the law to mend the testator's blunder"—by Lord Penzance. This has been followed in the cases of *In the goods of Dilkes*, L. R. 3 P. & D. 164; and *Margary v. Robinson*, 12 P. D. 8. But see *Royle v. Harris*, [1895] P. 163, in which these cases were distinguished.

(z) Where the testator, after signing his name to his Will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature, and immediately afterwards the witnesses signed their names, the Court held that the testator did not sign or acknowledge his signature to the Will, as containing such clause, and that probate should issue without it: *In the goods of Arthur*, L. R. 2 P. & D. 273. And see *In the goods of White*, [1896] 1 Ir. 269.

(a) *Corneby v. Gibbons*, 6 Notes of Cas. 679; *Re Corder*, 1 Robert. 669; *Re Kirby*, 6 Notes of Cas. 693; *In the goods of Hubbuck*, [1905] P. 129.

The stat. 1 Vict. c. 26, s. 9, enacts that the Will may be signed either by the testator, "or some other person in his presence and by his direction."

The signature by the direction of the testator may, it appears, notwithstanding the contrary view expressed by Lord St. Leonards in his essay on the Law of Wills, p. 38, be by one of the attesting witnesses (*b*), and if the person signing for the testator signs in his own name, and not in that of the testator, such signature is sufficient (*c*).

Where it is proved that the testator duly acknowledged a signature to the attesting witnesses, it has been considered sufficient, *primâ facie*, without proving that the signature is in his handwriting, or that it was made "by some other person in his presence and by his direction" (*d*).

It is not necessary that all the sheets or papers of which a Will consists should be signed by the testator: or that they should all be connected together: It is enough if they were in the same room where the execution took place; and it must be presumed, *primâ facie*, that they were so (*e*).

So where a duly executed Will followed by several additions and alterations, at the end of which appeared the signature of the testator and attesting witnesses, it was held that the signature and attestation clause applied to all the dispositive clauses written above them, although these had been apparently written at different times (*f*).

SECTION II.

The Attestation of Wills and Codicils.

The stat. 1 Vict. c. 26, s. 9 (*g*), enacts, that no Will (or testament or codicil, or any other testamentary instrument), shall be valid unless the *signature* shall be "made or acknowledged by the testator in the presence of two or more

What is a sufficient signing by "some other person."

Whether the acknowledgment by the testator of a signature suffices, without showing who wrote it.

Signature where the Will consists of several sheets:

or of several clauses written at several times.

(*b*) *In the goods of Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Robert. 262.

(*c*) *In the goods of Clark*, 2 Curt. 329.

(*d*) *Gaze v. Gaze*, 3 Curt. 456, per Sir H. Jenner Fust.

(*e*) *Gregory v. The Queen's Proctor*, 4 Notes of Cas. 620, 639, *post*, pp. 71, 75; *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Rees v. Rees*, L. R. 3 P. & D. 84; *Lewis v. Lewis*, [1908] P. 1.

(*f*) *In the goods of Cattrall*, 3 Sw. & Tr. 419.

(*g*) As to the law with respect to Wills made before 1 Jan., 1838, the date of the commencement of the Wills Act, see the earlier Editions of this Work: Pt. I. Bk. II. Ch. II. § II.

As to Wills, &c., made on or after Jan. 1, 1838. The signature must be made

or acknowledged in the presence of two or more witnesses present at one time, and they shall attest and subscribe the Will in the testator's presence.

What is a sufficient acknowledgment of the testator's signature to the witnesses.

witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary" (h).

The Statute of Frauds required, with respect to a Will of lands, that it should be "attested and subscribed in the presence of the deviser, by three or four credible witnesses."

It will be observed, that besides the change from three to two in the number of witnesses, there are several important differences between the exigencies of the two statutes.

The Statute of Frauds merely required, that the witnesses should attest and subscribe *the Will*; and it was held in the construction of this enactment, that it was unnecessary for the testator actually to *sign* his Will in the presence of the three witnesses who subscribed the same; but that any acknowledgment before them, that it was his Will, made their attestation and subscription complete (i). It was further held, that it was sufficient if the testator acknowledged *in fact*, though not in words, to the witnesses that the instrument was his Will, even though such acknowledgment conveyed no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of signing; and consequently, that if the witnesses subscribed their names as witnesses, at the testator's request, *without seeing his signature*, or being informed of the nature of the instrument, the statute was satisfied (k). But the statute of Victoria requires further, that the *signature* of the testator "shall be *made or acknowledged* by the testator" in the presence of the two attesting witnesses. Soon after the Act came into operation, a doubt appears to have been suggested (l), whether an acknowledgment of the signature was intended to be effectual in any other case than where the signature had been made "by some other person" by the direction of the testator: But Sir H. Jenner Fust was clearly of opinion, that the statute meant, that whether the signature be made by the testator, or by some other person, if it be acknowledged by the testator in the presence of the two witnesses, the execution shall be good. A more difficult

(h) As to the meaning of the expression "in the presence" in the Wills Act, see *Brown v. Skirrow*, [1902] P. 3, 5.

(i) *Ellis v. Smith*, 1 Ves. Jun. 11; *Casement v. Fulton*, 5 Moo. P. C. 138, by Lord Brougham.

(k) *White v. Trustees of the British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *Johnson v. Johnson*, 1 Cr. & M. 140.

(l) *In the goods of Regan*, 1 Curt. 908.

question hereupon arises, in cases where the signature is made by the testator, but not in the presence of the attesting witnesses, as to what shall be a sufficient acknowledgment of it by him in their presence (*m*). The result of the cases

(*m*) The whole law as to what is a sufficient acknowledgment of a signature, not written by the testator in the presence of the witnesses, is very fully discussed in the cases of *Blake v. Blake*, 7 P. D. 102; *Wright v. Sanderson*, 9 P. D. 149; and *Daintree v. Fasulo*, 13 P. D. 67, 102, and the result seems to be that where the evidence is such that the Court concludes that the witnesses (or either of them) did not see the signature, the fact that the testator spoke to the witnesses of the attested document as his Will, or stated that he had signed the Will, but the witnesses were not able to see his signature, that is not a sufficient acknowledgment. In *Blake v. Blake*, it was decided that to constitute a sufficient acknowledgment, within sect. 9 of the Wills Act, the witnesses must at the time of acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his Will, or that his signature is inside the paper. In this case, Jessel, M.R., dissents from the view of Lord Penzance, expressed in *Beckett v. Howe*, L. R. 2 P. & D. 1, that Sir C. Cresswell meant to lay down the doctrine that, if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. But it is to be observed that in the absence of affirmative proof that the witnesses did not see, or could not have seen, the signature of the testator, the Courts will (unless there is evidence to the contrary), in the absence of fraud, presume in a case where there is a proper attestation clause, or where the evidence shows that the testator knew the law, that the attesting witnesses saw the acknowledged signature: *Woodhouse v. Balfour*, 13 P. D. 2; not so, however, where there is no formal attestation clause and no affirmative evidence that at the time of attestation the deceased's name was on the paper; for the mere production of it to the witnesses, with a request that they will sign it as a paper, is not in itself sufficient to justify the Court in drawing the inference that it was already signed by the deceased: *Fischer v. Popham*, L. R. 3 P. & D. 246. In *Blake v. Knight*, 3 Curt. 547, 561, Sir H. Jenner Fust deals with the question of what evidence should lead the Court to pronounce for or against the validity of a Will duly attested on the face of it. And the same learned judge in *Cooper v. Bockett*, 3 Curt. 659, 663 (affirmed in the Privy Council), said that "where the *res gestæ* do not confirm the impressions of the witnesses the Court must look at the circumstances of the case as it is always at liberty to do." In *Wright v. Sanderson* (*ubi sup.*), Lord Selborne, after quoting these two judgments of Sir H. Jenner Fust, and after stating that the reasons given by Dr. Lushington for the decision of the Judicial Committee in *Lloyd v. Roberts*, 12 Moo. P. C. 165, proceed on the same principles and upon the presumption of the due execution of a holograph Will on the face of which everything is regular, and where there is no question of fraud, affirms the judgment of Sir J. Hannen, pronounced for the validity of a holograph codicil in a case in which neither of the attesting witnesses could say anything as to what writing was on the paper, nor as to whether the testator's signature was there when they signed, and where both said that they did not see him sign. Lord Justice Fry in the same case held that as the codicil *ex facie* appeared to be properly executed and the presumption *omnia rite esse acta* was

appears to be, that where the testator produces the Will, with his signature visibly apparent on the face of it, to the witnesses, and requests them to subscribe it, this is a sufficient acknowledgment of his signature (*n*): But not where they are unable to see the signature, and the testator merely calls them in to sign, without giving them any explanation of the instru-

strengthened by the conduct of the testator, which showed an anxious and intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect. So, too, in *Daintree v. Fasulo*, 13 P. D. 67, 102, Butt, J., in holding that a codicil was entitled to probate in a case in which the witnesses were not aware that the paper was a testamentary paper, and had no clear recollection as to the signature, points out that his decision is in accordance with that of Sir H. Jenner Fust in the case of *In the goods of Thomson*, 4 Notes of Cas. 643, and that that case, notwithstanding the observations of Lord Penzance in *Pearson v. Pearson*, L. R. 2 P. & D. 451, was not inconsistent with the decision of the Privy Council in *Ilott v. Genge*, 4 Moo. P. C. 265, because the leading feature in *Ilott v. Genge*, viz., that the witnesses were not allowed to see the testator's signature, which was covered up, did not exist in the case of *In the goods of Thomson*. This view was affirmed in the Court of Appeal.

It will be observed that, in the case of *Blake v. Blake* also, the signature was covered up. It may be that there is a distinction between the rule in the cases where the testator acknowledges his signature, and in cases where he signs in the presence of the witnesses, as to what opportunity or possibility there must be of the witnesses seeing what it is that is written. See *Smith v. Smith*, L. R. 1 P. & D. 143. On the application of the maxim "*omnia presumuntur rite esse acta*," see *Woodhouse v. Balfour*, 13 P. D. 2; and *post*, p. 76.

(*n*) In the following cases there was held to be a sufficient acknowledgment: *Gaze v. Gaze*, 3 Curt. 451; *Blake v. Knight*, *ib.* 547; *Keigwin v. Keigwin*, *ib.* 607; *In the goods of Davis*, *ib.* 748; *In the goods of Ashmore*, *ib.* 756; *Cooper v. Bockett*, *ib.* 649; 4 Moo. P. C. 419; *In the goods of Thomson*, 4 Notes of Cas. 643; *Leech v. Bates*, 6 Notes of Cas. 704; *Faulds v. Jackson*, 6 Notes of Cas. Supp. 1; *Burgoyne v. Showler*, 1 Rob. 12; *Bosanquet v. Bosanquet*, 2 Rob. 577; *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *Vinnicombe v. Butler*, 3 Sw. & Tr. 580; *Beckett v. Howe*, L. R. 2 P. & D. 1; *Inglesant v. Inglesant*, L. R. 3 P. & D. 172; *Daintree v. Fasulo*, 13 P. D. 67, 102. It is not necessary that a testator should state to the witnesses that it is his signature: the production of a Will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the statute: *Ilott v. Genge*, 3 Curt. 172, 175, per Sir H. Jenner Fust. See also *Blake v. Knight*, *ib.* 563, 564; *In the goods of Thomson*, 4 Notes of Cas. 643; *Leech v. Bates*, 6 Notes of Cas. 704, by Sir H. Jenner Fust. The like was held where the testator had intimated to the same effect by *gestures*: *In the goods of Davies*, 2 Robert. 337. The request of another person in the presence of the testator may be equivalent to a request by the testator himself: *Faulds v. Jackson*, 6 Notes of Cas. Suppl. 1; *Re Jones*, Dea. & Sw. 3; *Inglesant v. Inglesant*, L. R. 3 P. & D. 172.

ment they are signing (o). So in a case before Sir C. Cresswell, the witnesses were invited by the testator to witness his signature on a paper which appeared to them to be a blank: They saw no writing whatever on it, and the signature they witnessed was on the fourth side of a sheet of paper folded in the middle: On the first side of that sheet, when the paper was produced for probate, there appeared to be a codicil; but there was no evidence that anything was written on the paper before the signatures were put there: And on that ground, the learned judge, after consideration, refused to admit the paper to probate (p).

It may here be observed, that the Wills Act further enacts, by sect. 13, "that every will executed in manner hereinbefore mentioned shall be valid without any other publication thereof." And it has been said (q), that the result of this enactment is, that the testator need not inform the witnesses of the nature of the instrument they are attesting, and that even if he deceives them and leads them to believe that it is a deed, and not a Will, the execution is good notwithstanding.

(o) In the following cases there was held to be no sufficient acknowledgment: *Ilott v. Genge*, 3 Curt. 160 (affirmed in Privy Council, 4 Moo. P. C. 265); *Hudson v. Parker*, 1 Rob. 14; *In the goods of Summers*, 2 Rob. 295; *Croft v. Croft*, 4 Sw. & Tr. 10; *In the goods of Swinford*, L. R. 1 P. & D. 630; *Pearson v. Pearson*, L. R. 2 P. & D. 451; *Morrill v. Douglas*, L. R. 3 P. & D. 1; *Fischer v. Popham*, L. R. 3 P. & D. 246; *Blake v. Blake*, 7 P. D. 102. It is not sufficient merely to produce the paper to the witnesses where it does not appear that the signature of the testator was affixed to it at the time: *Ilott v. Genge*, 3 Curt. 160, 181, per Sir H. Jenner Fust; *In the goods of Ashton*, 5 Notes of Cas. 548.

(p) *In the goods of Hammond*, 3 Sw. & Tr. 90. It will be seen from the cases cited above that evidence is admissible as to whether the signature of the testator was on the Will at the time of attestation. But sometimes it happens that no direct evidence is forthcoming. In such cases the Court is at liberty to judge from the circumstances of the case whether it was probable that the name of the testator was on the Will at the time of attestation: *In the goods of Huckvale*, L. R. 1 P. & D. 375; *In the goods of Pearn*, 1 P. D. 70. The fact that there is an attestation clause in the proper form would seem itself to be some evidence that the name of the testator was on the Will at the time of attestation: *In the goods of Huckvale*, *ubi sup.*; *In the goods of Pearn*, *ubi sup.*; *Wright v. Rogers*, L. R. 1 P. & D. 678; *Woodhouse v. Balfour*, 13 P. D. 2. See further on this point, *Smith v. Smith*, L. R. 1 P. & D. 143. But the existence of an attestation clause is not conclusive: *In the goods of Swinford*, L. R. 1 P. & D. 630; *Croft v. Croft*, 4 Sw. & Tr. 10; *Fischer v. Popham*, L. R. 3 P. & D. 246.

(q) Sugden's Essay, p. 140, citing *Trimmer v. Jackson*, 4 Burn, E. L. 130; *British Museum v. White*, 3 Moo. & P. 689.

The attestation must be *after* the testator has signed or acknowledged his signature to both the witnesses being present at the same time: and they must attest in the presence of the testator, though not of each other:

Again, in the construction of the Statute of Frauds, it was held that the Act did not require that the witnesses should subscribe in the presence of each other, but that they might attest the execution separately, at different times (*r*). But the Wills Act makes it necessary that both the witnesses to the Will shall be present, at the same time, when the signature is made or acknowledged by the testator. And they must attest in the presence of the testator, *though not of each other* (*s*). And it appears to be now fully established that the Act is not complied with, unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made or acknowledged to them when *both* are actually present at the same time (*t*). And if one of the witnesses has subscribed *before* the testator signs or acknowledges his signature in the presence of both, and the other witness alone then subscribes in the presence of the former witness and the testator, this is not sufficient, even though the former witness then expressly acknowledges the signature which he has previously made: For the Act says that the testator may *acknowledge* his signature; but does not say, that the witnesses may acknowledge their subscriptions. Thus, in *Moore v. King* (*u*), a testator signed a codicil in the presence of a witness (his sister) who, at his desire, attested and subscribed it: On a subsequent day, when the sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying in the presence of both parties and pointing to his signature, "This is a codicil signed by myself and by my sister, as you see; you will oblige me, if you will add your signature, two witnesses being necessary": That party then subscribed in

(*r*) *Ellis v. Smith*, 1 Ves. Jun. 12.

(*s*) *Cooper v. Bockett*, 3 Curt. 659, per Sir H. Jenner Fust; *Faulds v. Jackson*, 6 Notes of Cas. Suppl. 1; *In the goods of Webb*, Dea. & Sw. 1; *In the goods of Sullivan*, 3 L. R. Ir. 299; *Brown v. Skirrow*, [1902] P. at p. 5. In *Casement v. Fulton*, 5 Moo. P. C. C. 130, the same Court held (without adverting to their previous decision) that the witnesses must attest *in the presence of each other*. This case, however, has not been followed.

(*t*) *Moore v. King*, 3 Curt. 243; *Cooper v. Bockett*, *ib.* 648; 4 Moo. P. C. 419. See also *In the goods of Allen*, 2 Curt. 331; *In the goods of Olding*, *ib.* 865; *In the goods of Simmonds*, 3 Curt. 79; *In the goods of Byrd*, *ib.* 117; *Pennant v. Kingscote*, *ib.* 643, 647; *Hindmarsh v. Charlton*, 8 H. of L. 160; *Wyatt v. Berry*, [1893] P. 5; *Brown v. Skirrow*, [1902] P. 3, 7. The words of the Act are, such witnesses "*shall attest and shall subscribe the Will in the presence of the testator*": 3 Curt. 660, per Sir H. Jenner Fust.

(*u*) 3 Curt. 243.

the presence of the testator and his sister, *the latter*, who was standing by him, *pointing to her signature and saying*, "*There is my signature*"; you had better place yours underneath": She did not, however, re-subscribe: And it was held by Sir H. Jenner Fust, that the instrument was not sufficiently attested under the new statute.

It will be observed that the provision of the Statute of Frauds, requiring that the witnesses shall attest and subscribe *in the presence of the testator*, is continued in the Statute of Victoria, and as the language in both the Acts is the same in this respect, it should seem that the decisions which have taken place as to the former will govern the construction of the latter. The result of them is, that it is not requisite that the testator should actually see the witnesses sign, but that it is sufficient if he might have seen them if he chose to look (*x*). Thus where a Will was executed by the testatrix in her carriage and the witnesses subscribed in the attorney's office, opposite to the window of which the carriage was, so that she might have seen them through the window while subscribing, it was held that the statute was satisfied (*y*). But where the witnesses signed in an adjoining room to that in which the testator was, and the door between them was open, but he was not in such position that he could see them, it was held that the attestation was ill (*z*). In a case in the Prerogative Court (*a*), where the question arose on a Will made after the Wills Act came into operation, the witnesses had attested in the room where testator was lying in bed with the bed-curtains closed around him, so that he could not, for that reason, have seen the witnesses while they were subscribing; Sir H. Jenner Fust was of opinion that where a paper is executed by the deceased in the same room where the witnesses are, who attest it in the same room where the testator was at the time, they do attest it in the presence of the testator, though he may not actually see them sign: The Will was accordingly admitted to probate. But in

what is to be considered as the presence of the testator:

(*x*) *Shires v. Glascock*, 2 Salk. 688; *Day v. Smith*, 3 Salk. 395; *Todd v. Winchelsea*, M. & Malk. 12.

(*y*) *Casson v. Dade*, 1 Bro. C. C. 99.

(*z*) *Doe v. Manifold*, 1 M. & S. 249; *Winchelsea v. Wauchope*, 3 Russ. 441. Held, accord. since the Wills Act, *In the goods of Newman*, 1 Curt. 914; *In the goods of Ellis*, 2 Curt. 395; *In the goods of Colman*, 3 Curt. 118; *Jenner v. Finch*, 5 P. D. 106.

(*a*) *Newton v. Clarke*, 2 Curt. 320.

a subsequent case in the same Court (b), where the testatrix lay with the curtain closed, and her back to the attesting witnesses when they subscribed, and it appeared that she could not by possibility have seen them do so, even if the curtains had not been closed, by reason of her inability, from her state of weakness, to have turned herself in her bed into a position in which she could have seen them sign, the same judge held that the statute was not complied with, and he distinguished the case from the former one where the testator could have seen but that the curtains were closed; And the learned judge added that in the present case there would have been no difference, in principle, if the witnesses had signed the Will down-stairs. Sir John Dodson held that where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names (c).

Though the testator was blind, yet it must be shown that he could have seen the witnesses sign, had he had his eyesight (d).

The Wills Act provides (e) that "no form of attestation shall be necessary." It is, therefore, sufficient if the witnesses, without any attestation clause of any description, merely subscribe their names (f). But it must be observed, that unless there is an attestation clause, reciting that the formalities prescribed by the Act have been complied with, the executor cannot obtain probate in the usual way on his own oath alone; but must produce an affidavit from one of the attesting witnesses, or some other satisfactory evidence showing that the solemnities have been performed as required by the statute (g).

(b) *Tribe v. Tribe*, 7 Notes of Cas. 132; *S. C.*, 1 Robert. 775.

(c) *Norton v. Basset*, Dea. & Sw. 259. In the goods of *Trinmel*, 11 Jurist, N. S. 248, 249, Sir J. P. Wilde laid it down that the true test is, whether the testator might have seen, not whether he did see the witnesses sign their names. The testator must, it would seem, be conscious of the presence of the attesting witnesses: *Right v. Price*, Doug. 241; *In the goods of Kellick*, 3 Sw. & Tr. 578; *Jenner v. Ffinch*, 5 P. D. 106. See *Carter v. Seaton*, 85 L. T. R. 76; *Brown v. Skirrow*, [1902] P. 3.

(d) *In the goods of Piercy*, 1 Robert. 278.

(e) Sect. 9.

(f) *Bryan v. White*, 2 Robert. 315. An attestation clause forms no part of a [Will or] codicil even when written by the testator, and, therefore, a recital by mistake in an attestation clause to a codicil that a former codicil was cancelled does not revoke that codicil: *In the goods of Atkinson*, 8 P. D. 165.

(g) See *post*, Pt. I. Bk. iv. Ch.-II. § III.: and see the Rules of 1862 & 1871 (non-contentious), Nos. 4, 5, 6 and 7.

The decisions (*h*) on the construction of the Statute of Frauds appear to make it clear that in the case of the witnesses, as well as of the testator (*i*), a subscription by mark is sufficient, notwithstanding the witness be able to write. And these decisions have been followed, in the Ecclesiastical Court, in the construction of the Wills Act (*k*). So where a Will was attested by one witness in his own handwriting, and he also held and guided the hand of a second witness, who could not write or read, and in this way the second witness's name was written as attesting witness, the testator having desired the two to attest; this was held a sufficient attestation under the Wills Act (*l*). But an attestation by *sealing* will not satisfy the statute (*m*).

the witnesses
may subscribe
by mark :

or with a
guided hand :

It has been decided several times that, in the case of a witness, an acknowledgment by him of his previously subscribed signature is not a sufficient compliance with this Act (*n*). Accordingly where an attesting witness to a Will, on the re-execution thereof by the testator, merely traced over his previous signature with a dry pen, Sir H. Jenner Fust held that this amounted to no more than to an acknowledgment of the signature, which had been held not to be a sufficient compliance with the statute,

but not by
seal :

acknowledg-
ment of
signature not
sufficient :

(*h*) *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, *ib.* 504.

(*i*) See *Baker v. Dening*, 8 A. & E. 94, *ante*, p. 54.

(*k*) *In the goods of Ashmore*, 3 Curt. 756; *In the goods of Amiss*, 2 Robert. 116; *S. C.*, 7 Notes of Cas. 274. See also *Hindmarsh v. Charlton*, 8 H. of L. 160. The initials of the witnesses may constitute a sufficient subscription and attestation, if made by them for their signatures as attesting the execution: *In the goods of Christian*, 2 Robert. 110. So also the initials of a testator and the attesting witnesses in the margin of the Will opposite interlineations are sufficient to render the interlineations valid under sect. 21 of the Wills Act: *In the goods of Blewitt*, 5 P. D. 116; though the initials of the witnesses in the margin, if merely placed to attest the alteration, will not serve as an attestation to the Will itself: *In the goods of Martin*, 1 Robert. 712.

(*l*) *Harrison v. Elvin*, 3 Q. B. 117; *In the goods of Frith*, 1 Sw. & Tr. 8; *Lewis v. Lewis*, 2 Sw. & Tr. 153. But the one witness cannot subscribe for the other: *In the goods of White*, 2 Notes of Cas. 461; *In the goods of Leverington*, 11 P. D. 80. The desire that another should sign for a witness cannot be construed to be a subscription by that witness, even though he cannot write; for he might make his mark: *In the goods of Cope*, 2 Robert. 335. So in a case where the two attesting witnesses, who were able to write, held the top of the pen whilst another person (the drawer of the Will) wrote their names, Sir H. J. Fust rejected the motion for probate, and observed, that where a person's hand is guided, the act is his own, but that here another person signed the names of the witnesses: *In the goods of Kilcher*, 6 Notes of Cas. 15.

(*m*) *In the goods of Byrd*, 3 Curt. 117.

(*n*) *Moore v. King*, 3 Curt. 253.

there must be either the name of the witness or a mark intending to represent it :

in what part of the Will they must subscribe :

inasmuch as it requires the witness to *subscribe* the Will (o). And it is now settled by the decision of the House of Lords (p), that to make a valid subscription and attestation there must be either the name of the witness, or some mark intended to represent it (q). It was further held in that case that a correction of an error in the previous writing of his name, or his acknowledgment of it, or the adding a date to it, will not be sufficient for this purpose (r).

The Act, though it requires that the testator shall sign the Will at the foot or end of it, is silent as to the part of the instrument where the witnesses shall subscribe. It was said by Dolben, J., in *Lea v. Libb* (s), with reference to the Statute of Frauds, that if a Will is written on different sheets of paper, and each of the three witnesses subscribe on a different sheet, it is a good subscription within that statute. If this be good law, it should seem to be equally applicable to the Statute of Victoria. And it has been held, accordingly, in several cases in the Ecclesiastical Court, that it matters not, under that statute, in what part of the Will the attesting witnesses sign their names;

(o) *Playne v. Scriven*, 1 Robert. 772; *In the goods of Maddock*, L. R. 3 P. & D. 169. Where the deceased executed his will in the presence of two witnesses, one of whom also made his mark in attestation of the signature of the deceased, and the second witness then wrote the names of the deceased and the witness opposite their respective marks, and also the word "witness," but did not subscribe his own name, the Court held that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid: *In the goods of Eynon*, L. R. 3 P. & D. 92.

(p) *Hindmarsh v. Charlton*, 8 H. of L. 160; affirming the decision of Sir O. Cresswell, 1 Sw. & Tr. 433.

(q) A witness need not sign his own name if the name actually subscribed be intended to represent his name: *Re Oliver*, 2 Eccl. & Adm. 57. But a Will signed by the deceased in the presence of two persons, one of whom subscribed it with his own name, and the other with the name of her husband, was refused probate: *In the goods of Leverington*, 11 P. D. 80. The signing of a Christian name if not intended as a perfect signature is not sufficient: *In the goods of Maddock*, L. R. 3 P. & D. 169. But where the witness subscribed "Servant to Mrs. Sperling," but without any name, this was held a sufficient attestation: *In the goods of Sperling*, 3 Sw. & Tr. 272. See further as to what is a sufficient attestation, *Griffiths v. Griffiths*, L. R. 2 P. & D. 300.

(r) And in a case where an attesting witness to a Will which had once been duly executed, attested a second execution of the same Will by no other act than by writing the word "Bristol" (the name of the city), at the end of her name and the name of the street in which she dwelt (which she had written when she attested the former execution), it was held by Sir H. Jenner Fust that the latter attestation was insufficient: *In the goods of Trevanion*, 2 Robert. 311.

(s) Carth. 37.

provided it appears that the signatures were meant to attest the requisite signature of the testator (*t*). The same question was decided, after full consideration, by the Court of Queen's Bench, in the case of *Roberts v. Phillips* (*u*), upon the language of the Statute of Frauds, which requires that a Will of lands shall be "attested and subscribed" by the witnesses: It was thereupon contended, that the primary meaning of the word "subscribed" is *written under*, and that it must here mean *written under the concluding words of the Will*, and signature of the testator, and so preventing any spurious additions after the execution: But the Court held that the word "subscribed" might well be understood as merely denoting a signing of the name without any reference to the part of the paper on which the name is to be written; and that the requisition as to the Will being subscribed by the witnesses was complied with, where the witnesses, who saw it executed by the testator, immediately signed their names on any part of it at his request with the intention of attesting it.—This decision is plainly applicable to the construction of the word "subscribe" in the Wills Act.

No provision is contained in the Act as to Wills written on several sheets. And, therefore, in this respect also, the decisions on the construction of the Statute of Frauds appear to be authorities: And, they have established that if a Will be written on several or even separate sheets, and the last alone be attested, the whole Will is well executed, provided the whole be in the room, and although a part may not have been seen by the witnesses; and that it is a question for a jury whether all the papers constituting the Will were in the room; and further, that the presumption is in the affirmative (*x*). But where a

attestation of
a Will written
on several
sheets:

(*t*) *In the goods of Davis*, 3 Curt. 748; *In the goods of Chamney*, 1 Robert. 757. But where there were two testamentary instruments, it was held not sufficient for the witnesses to subscribe their names at the end of the first of them alone, notwithstanding they were both written on the same sheet of paper: *In the goods of Taylor*, 2 Robert. 411. And where an intended Will was written in duplicate, one copy of which was signed only by the testator, and the other only by the attesting witnesses, it was held that neither paper was entitled to probate: *In the goods of Hatton*, 6 P. D. 204.

(*u*) 4 E. & B. 450. This case was followed in the case of *In the goods of Streatley*, [1891] P. 172, where the attesting witnesses to a Will signed their names in the margin of the first and second sheets opposite to certain amendments.

(*x*) *Bond v. Seawell*, 3 Burr. 1773; *Gregory v. The Queen's Proctor*, 4 Notes of Cas. 620, 639; *Marsh v. Marsh*, 1 Sw. & Tr. 528; *In the goods of Fuller*, [1892] P. 377; *Lewis v. Lewis*, [1908] P. 1. In cases where the attestation is not on the same sheet of paper as the

Will was signed by the testator and also by two witnesses in the margin of the first four sheets, but in the fifth and last sheet the signature of the testator alone appeared, probate of the Will was refused, the Court (Sir J. Dodson) being of opinion that the signatures on the earlier sheets were intended merely to guard against other sheets being interpolated, and there being nothing to show that the signatures in the margin were intended to attest that signature of the testator which alone would give effect to the paper as a Will (y).

in what cases
unattested
papers
referred to
by a Will or
codicil duly
executed
become a
part of it.

Again, the authorities with respect to the Statute of Frauds appear to apply to the Wills Act, upon the question, whether an unattested Will or other paper may be rendered valid as a testamentary disposition, by being referred to and adopted by a Will or codicil properly attested. Those authorities have established, that if the testator, in a Will or codicil or other testamentary paper duly executed, refers to an existing unattested Will or other paper, the instrument so referred to becomes part of the Will (z). But the reference must be

signature of the testator the attestation must be on a paper physically connected with that sheet: *In the goods of Braddock*, 1 P. D. 433. At all events, this must be so where the paper, which has not on it the attestation, is a codicil or other testamentary document complete in itself: *In the goods of Pearse*, L. R. 1 P. & D. 382; *In the goods of Hatton*, 6 P. D. 204.

(y) *Ewen v. Franklin*, Dea. & Sw. 7. See accord. *Phipps v. Hale*, L. R. 3 P. & D. 166.

(z) *Habergham v. Vincent*, 2 Ves. 228; *Utterton v. Robins*, 1 A. & E. 423; *Doe v. Evans*, 1 Cr. & M. 42. The intention to incorporate must be clear, and the document, it would seem, should be of a testamentary character: *In the goods of Hubbard*, L. R. 1 P. & D. 53; but comp. *Bizzey v. Flight*, 3 C. D. 269. Where a Will (dated in 1841) revoking all former Wills referred to a clause in a former Will, Sir H. Jenner Fust refused to grant probate of so much of the former Will as was necessary to explain the latter Will: *In the goods of Sinclair*, 3 Curt. 746; but see *In the goods of Duff*, 4 Notes of Cas. 274. See also *In the goods of Bangham*, 1 P. D. 429. The principles and practice, as to incorporating, in the probate of Wills, papers sufficiently referred to by such Wills, but not *per se* testamentary, are fully discussed and explained in the judgment of Dr. Lushington, in *Sheldon v. Sheldon*, 1 Robert. 81; *Bizzey v. Flight*, 3 C. D. 269; *In the goods of Howden*, 43 L. J. P. & M. 26. In theory the incorporated document should always be included in the probate, but in practice the Court does not always insist on this, notably where the paper referred to is in the hands of another party who will not part with it, and the Court has no power to order its production: *In the goods of Battersbee*, 2 Rob. 439; *In the goods of Sibthorp*, L. R. 1 P. & D. 106; or where the document is bulky: *In the goods of Lansdowne*, 3 Sw. & Tr. 194; *In the goods of Dundas*, 32 L. J. P. & M. 165; nor does it insist on including the whole where part only is material: *In the goods of Limerick*, 2 Rob. 313. As to the incorporation of foreign Wills, see *In the goods of Howden*, 43 L. J.

distinct, so as, with the assistance of parol evidence when necessary and properly admissible, to exclude the possibility of mistake (a); and the paper referred to must be already written (b). Accordingly, in *De Zichy Ferraris v. Lord Hertford* (c), where a testator by Will, duly executed, directed his executors to pay legacies which he should give by any testamentary writing signed by him, *whether witnessed or not*, it was held that such a clause could not give effect to legacies bequeathed by an unattested paper made after the Wills Act came into operation.—Again, in the same case, it appeared that the testator, before Jan. 1, 1838 (at which date the Wills Act

P. & M. 26; *In the goods of Astor*, 1 P. D. 150. See also *In the goods of Marchant*, [1893] P. 254.

(a) Where a Will refers to a paper, such paper cannot be incorporated with the Will unless it be clearly identified with the description of it given in the Will, and be shown to have been in existence at the time the Will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper with the Will: *Singleton v. Tomlinson*, 3 App. Cas. 404; *In the goods of Kehoe*, 13 L. R. Ir. 13, Prob. The following are some of the principal cases on the sufficiency of the proof of identity: *Dillon v. Harris*, 4 Bligh, N. S. 321; *In the goods of Drummond*, 2 Sw. & Tr. 8; *In the goods of Brewis*, 3 Sw. & Tr. 473; *Dickinson v. Stidolph*, 11 C. B. N. S. 341; *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6; *In the goods of Sunderland*, L. R. 1 P. & D. 198; *In the goods of Lady Truro*, ib. 201; *In the goods of Watkins*, ib. 19; *In the goods of Dallow*, ib. 189; *In the goods of Gill*, L. R. 2 P. & D. 6; *In the goods of Mercer*, ib. 91; *In the goods of Heathcote*, 6 P. D. 30; *In the goods of Daniell*, 8 ib. 14; *In the goods of Garnett*, [1894] P. 90; *Eyre v. Eyre*, [1903] P. 131.

(b) The following are some of the cases as to the necessity of the incorporated paper being already in existence: *Wilkinson v. Adam*, 1 Ves. & B. 445; *Utterton v. Robins*, 1 A. & E. 423; *In the goods of Gill*, L. R. 2 P. & D. 6; *Singleton v. Tomlinson*, 3 App. Cas. 404; *In the goods of Smart*, [1902] P. 238. A testamentary paper duly executed in order to incorporate another must refer to it as a written instrument then existing in such terms that it may be ascertained: *Smart v. Prujean*, 6 Ves. 565; *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6; *In the goods of Sunderland*, L. R. 1 P. & D. 198; *University Coll. v. Taylor*, [1908] P. 140. The republication of a Will by the execution of a codicil will not of itself entitle an unexecuted paper written or signed between the date of the Will and the date of the codicil to probate: *Durham v. Northen*, [1895] P. 66. But where the Will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document although not in existence until after the execution of the Will is entitled to probate by force of the codicil: *In the goods of Truro*, L. R. 1 P. & D. 201; *In the goods of Stewart*, 3 Sw. & Tr. 192; *In the goods of Matthias*, 3 Sw. & Tr. 100. See as to these two last cases, *In the goods of Smart*, [1902] P. at p. 239.

(c) 3 Curt. 468; *S. C.*, on appeal, 4 Moo. P. C. 339, *nomine Croker v. Lord Hertford*.

came into operation) had made a Will and several codicils, some duly executed, others only signed by the testator: After Jan. 1, 1838, he made and signed a codicil (B), but the same was not duly attested: Afterwards, by a codicil (C), duly executed and attested, he ratified and confirmed his Will and "codicils:" And it was held that the unattested codicil (B) was not so identified with the duly attested codicil (C) as to be ratified by, or incorporated with it; the word "codicils" being more completely and properly applicable to the codicils which had been made before Jan. 1, 1838 (*d*). But in *Ingoldby v. Ingoldby* (*e*), where a testator made a codicil to his Will in 1845, attested by one witness, and the day before his death dictated a paper (which was afterwards duly executed according to the Wills Act) as "another codicil to my Will," without more specifically referring to the defectively executed instrument, it was held that both codicils were entitled to probate: And Sir H. Jenner Fust distinguished, in delivering his judgment, this case from that of *Lord Hertford*, where there were codicils duly executed and codicils not duly executed; there being in the present case only one paper which came under the description of codicil, and no other paper to which the testator could have referred under that description.

A Will cannot create a power of disposition by a future unattested paper.

The decision in *Lord Hertford's Case* is an authority for the proposition that the doctrine already established as to devises of real estate under the Statute of Frauds, viz., that a testator

(*d*) See also accord. *Haynes v. Hill*, 1 Robert. 795; *In the goods of Phelps*, 6 Notes of Cas. 695; *In the goods of Hakewell*, Dea. & Sw. 14; *In the goods of Matthias*, 3 Sw. & Tr. 100.

(*e*) 4 Notes of Cas. 493. Just as a codicil which republishes a former Will, may, if the words of reference are sufficiently clear, incorporate not only the republished Will, but also documents not in existence at the date of the execution of the republished Will, so a later testamentary paper may entitle to probate a prior imperfectly executed testamentary paper; but this is, as appears from the text, merely an instance of incorporation, and subject to the same rules. See *In the goods of Truro*, L. R. 1 P. & D. 201. The question of incorporation may arise in respect of testamentary writings appearing on the duly executed paper: see *In the goods of Heathcote*, 6 P. D. 30; *In the goods of Watkins*, L. R. 1 P. & D. 19; *In the goods of Dallow*, L. R. 1 P. & D. 189; but this question would only arise if the Court was of opinion that the writing was not parcel of the Will. See *ante*, p. 59, note (*y*). The fact that the codicil is on the same paper is not of itself sufficient to incorporate it: *In the goods of Brewis*, 3 Sw. & Tr. 473; *In the goods of Watkins*, L. R. 1 P. & D. 19; nor are the words "This is a fourth codicil to my Will," although the unexecuted codicil commenced "This is a third codicil": *Stockil v. Punshon*, 6 P. D. 9. See, however, *In the goods of Heathcote*, 6 P. D. 32, per Hannen, P.

cannot by his Will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a Will or codicil applies equally to the present law (f).

The doctrines above stated as to the incorporation of unattested papers with duly executed Wills and codicils were fully confirmed, and very many of the cases which are collected in the notes to the foregoing pages were cited and discussed by Lord Kingsdown in delivering the opinion of the Privy Council in the case of *Allen v. Maddock* (g), and his Lordship proceeded to state the law as follows: "The result of the authorities, both before and since the late Act, appears to be, that where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified" (h).

Parol evidence
admissible to
identify the
reference.

Where a Will referred to two memoranda and only one could be found, it was held that effect must be given to that which was found—for either the ordinary presumption must prevail, that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed, merely because he made other dispositions of his property which are unknown by reason of the testamentary paper which contained them not being forthcoming (i).

Will referring
to two memo-
randa and
where one
only can be
found.

(f) *Johnson v. Ball*, 5 De G. & Sm. 85, 91. See *Briggs v. Penny*, 3 D. J. & S. 525; *In the goods of Adamson*, L. R. 3 P. & D. 253, 255; *Re Boyes*, 26 C. D. 531, 536.

(g) 11 Moore, P. C. 427, 461. See also *S. C.*, *coram* Sir J. Dodson, Dea. & Sw. 325; *University Coll. v. Taylor*, [1908] P. 140.

(h) But the reference in a Will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular: but the authorities seem clearly to establish that where there is a reference to any written document described as *then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it: *Allen v. Maddock*, 11 Moore, P. C. at p. 454; *In the goods of Dallow*, L. R. 1 P. & D. 189; *In the goods of Sunderland*, L. R. 1 P. & D. 198; *In the goods of Kehoe*, 13 L. R. Ir. 13; *University Coll. v. Taylor*, [1908] P. 140.

(i) *Dickinson v. Stidolph*, 11 C. B. N. S. 341.

Effect of the evidence of the attesting witnesses as to the circumstances of the attestation.

Not necessary to have positive affirmative evidence of execution. Presumption.

In acting upon the doctrines established by the authorities cited in the foregoing pages, no little difficulty has occurred with respect to the evidence given by the subscribing witnesses to the circumstances attending the attestation; particularly where the witnesses have been examined for the first time (as must very often happen) at a period long after the transaction. For it may be that they have no recollection at all on the subject, so that they are quite unable to affirm that the Will was executed according to the statute: Or it may be that one affirms and the other negatives, or that both negative, a compliance with the statute. The result of the cases on this subject appears to be, that although, if a party be put to proof of a Will, he must examine the attesting witnesses, it is not absolutely necessary, for the validity of the Will, to have their positive affirmative testimony that the Will was actually signed or actually acknowledged in their presence before they subscribed (*k*). For if the Will on the face of it appears to be duly executed, the presumption is "*omnia esse rite acta*;" even though there should be an attestation clause, omitting to state some essential particular, *e.g.*, that the Will was signed in the joint presence of both witnesses (*l*). So in a case where an affidavit was required from the attesting witnesses (there being no attestation clause) as to the due execution of the Will under

(*k*) *Blake v. Knight*, 3 Curt. 547; *Gregory v. The Queen's Proctor*, 4 Notes of Cas. 620; *Thomson v. Hall*, 2 Robert. 426. See further, as to this point, *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *Beckett v. Howe*, L. R. 2 P. & D. 1. As to the meaning and authority of these cases, see, however, *Blake v. Blake*, 7 P. D. 102; *Wright v. Sanderson*, 9 P. D. 149; and *ante*, p. 63, n. (*m*).

(*l*) *Wright v. Sanderson*, 9 P. D. 149; *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Burgoyne v. Showler*, 1 Rob. 5; *Smith v. Smith*, L. R. 1 P. & D. 143; *Doe v. Davies*, 9 Q. B. 648; *Leech v. Bates*, 1 Rob. 714; but see *Strong v. Hadden*, [1915] P. 211. The presumption applies even where the attestation clause is incomplete: *Vinnicombe v. Butler*, 3 Sw. & Tr. 580; *In the goods of Rees*, 34 L. J. P. & M. 56; *In the goods of Peverett*, [1902] P. 205. The maxim *omnia presumuntur rite esse acta* is an expression in a short form of a reasonable probability and of the propriety in point of law of acting on such probability. Thus, in the case of a lost Will, where it was proved that a document purporting to be the Will of the deceased was signed by him, that two names of deceased friends of his were written underneath, that one of the names was a genuine signature, and there was no evidence about the other name, the Court drew the inference that the signature as to which there was no evidence was a genuine signature, and that all was done properly, although there was no attestation clause to say so: *Harris v. Knight*, 15 P. D. 170; and see *In the goods of Phibbs*, [1917] P. 93. For a case where the Court refused to make such presumption, see *In the goods of Swinford*, L. R. 1 P. & D. 630.

the statute, and one of them deposed that he saw the deceased sign, in the presence of himself and the other witness, but the latter could not recollect whether the deceased signed her name in his presence or not, probate was allowed to pass on motion (*m*). Again, it has been held, that where the attesting witnesses depose contrary to each other (as where one swears that they attested the Will in the presence of the testator, and the other that it was attested in another room; or where one of three attesting witnesses swears that the testator signed in their presence, and the two others swear that he did not), the Court is not thereupon bound to pronounce against the validity of the Will; but may either examine other witnesses (who were present at the execution though they did not subscribe the Will) in order to arrive at the truth (*n*), or may, upon the mere circumstances, give credence to the affirmative rather than to the negative testimony (*o*). And even where both the attesting witnesses profess to remember the transaction, and state facts which show that the Will was not duly executed (as that the testator did not make or acknowledge his signature in their joint presence, or the like), not only may this negative evidence be rebutted by the testimony of other witnesses, or by the proof of circumstances showing that the attesting witnesses are not to be credited (*p*); but in this case also the Court may justly come to a conclusion from the facts and circumstances which the attesting witnesses themselves state, that their memory fails them; and so the Will may be admitted to probate, notwithstanding their testimony (*q*). Thus, in *Cooper v. Bockett* (*r*), a Will was held by Sir H. Jenner Fust, upon the circumstances of the case, to have been signed before the witnesses subscribed, although one witness deposed that the testator signed *after* he and his fellow witness had subscribed, and the other witness deposed that the part of the Will where the signature of the testator was written was blank when she, the witness, sub-

Where
attesting
witnesses
contradict
each other.

Where
attesting
witnesses
state facts
showing that
Will was not
duly executed.

(*m*) *In the goods of Hare*, 3 Curt. 54; *In the goods of Attridge*, 6 Notes of Cas. 597; *Daintree v. Fasulo*, 13 P. D. 67.

(*n*) *Young v. Richards*, 2 Curt. 371.

(*o*) *Chambers v. The Queen's Proctor*, 2 Curt. 433; *Gove v. Gawen*, 3 Curt. 151; *Wright v. Rogers*, L. R. 1 P. & D. 678.

(*p*) See accord. *Austen v. Willes*, Bull. N. P. 264; *Pike v. Badmering*, cited 2 Stra. 1096, in *Rice v. Oatfield*, post, Pt. I. Bk. IV. Ch. III. § v.

(*q*) *Cooper v. Bockett*, 3 Curt. 663. See also *Baylis v. Sayer*, 3 Notes of Cas. 22; *Shield v. Shield*, 4 Notes of Cas. 647.

(*r*) 3 Curt. 648.

scribed: And this decision was affirmed in the Privy Council (s). Where, however, the attesting witnesses state facts (not contradicted by other testimony) which demonstrate that the Will was not duly executed, and there are no circumstances on which the Court can found an inference that the recollection of the witnesses is infirm on the subject, the Will must be pronounced against, notwithstanding it should be all in the handwriting of the deceased, and be signed by him and profess to be duly attested (t).

Court must be satisfied that witnesses' names were subscribed to Will for purpose of attesting testator's signature.

Finally, it must be borne in mind that a testamentary paper is not entitled to probate, unless the Court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature (u).

SECTION III.

The Form of a Will.

"There is nothing that requires so little solemnity," said Lord Hardwicke, speaking of the law as it then was (x), "as the making of a Will of personal estate, according to the Ecclesiastical laws of this realm; for there is scarcely any paper writing which they will not admit as such." And although much greater strictness seems to have prevailed in earlier times, it has been decided in a great variety of modern instances, that it is not necessary that an instrument should be of a testamentary form, in order to operate as a Will. Indeed it may be considered as a settled point, that the *form* of a paper does not affect its title to probate, provided that it is the intention of the deceased that it should operate after his death (y), and that the paper is duly attested in accordance with the Wills Act, 1 Vict. c. 26 (z).

(s) 4 Moo. P. C. 419.

(t) *Pennant v. Kingscote*, 3 Curt. 642; *Beach v. Clarke*, 7 Notes of Cas. 120; *Croft v. Croft*, 34 L. J. P. M. & A. 44; *Blake v. Blake*, 7 P. D. 102.

(u) *In the goods of Wilson*, L. R. 1 P. & D. 269; *In the goods of Braddock*, 1 P. D. 433; *In the goods of Sharman*, L. R. 1 P. & D. 661; *Griffiths v. Griffiths*, L. R. 2 P. & D. 300; *In the goods of Streatley*, [1891] P. 172. And see ante, p. 72, n. (y).

(x) *In Ross v. Ewer*, 3 Atk. 163.

(y) By Sir John Nicholl, in *Masterman v. Maberly*, 2 Hagg. 248; *Doe v. Cross*, 8 Q. B. 714; *Cock v. Cooke*, L. R. 1 P. & D. 241; *Robertson v. Smith*, L. R. 2 P. & D. 43; *In the goods of Coles*, L. R. 2 P. & D. 362.

(z) *In the goods of Colyer*, 14 P. D. 48, where a paper executed in

Testamentary form not necessary; but it must be intention of deceased that paper shall operate after his death.

In some former Editions of this Work there were cited a large number of cases as to the effect, as Wills, of deeds, bonds, and other documents not testamentary in form, but it has been thought advisable, having regard to the improbability of such documents complying with the requirements of the Wills Act in respect of attestation and otherwise, and to the lapse of time since the passing of that Act, to omit these authorities from the present Edition.

If a man intends by Will to execute and purports to execute a power, and it turns out that the power is not well created, or does not exist, yet if he has a right to dispose of the fund, the Will may operate, and ought to be admitted to probate; for in a Will no particular words are necessary to pass the property, and his authority to give it shall come in aid of his intended disposition of it (a).

The supposed exercise of a power may operate as a mere Will.

It should be further observed, that it is not necessary for the validity of a testamentary instrument, that the testator should intend to perform, or be aware that he had performed a testamentary act (b); for it is undoubted law that, whatever may be the form of a duly executed instrument, and notwithstanding that it may be in the form of a settlement or deed of gift or a bond, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary (c).

Principles on which instruments not purporting to be testamentary may be admitted to probate:

the form of a deed, but bearing the attestation of two witnesses, was held entitled to probate. And in the case of *Milnes v. Foden*, 15 P. D. 105, two deeds poll were held entitled to probate. So in *In the goods of Slinn*, 15 P. D. 156, probate was granted of a deed poll duly executed and attested by two witnesses but containing no reference to the death of the testatrix, and extrinsic evidence was admitted to shew that she intended it to operate as a Will.

(a) *Southall v. Jones*, 1 Sw. & Tr. 298.

(b) *Bartholomew v. Henley*, 3 Phillim. 318; *Masterman v. Maberly*, 2 Hagg. 247; *In the goods of Baxter*, [1903] P. 12.

(c) *In the goods of Morgan*, L. R. 1 P. & D. 214; *Cock v. Cooke*, 1 P. & D. 241, 243; *Foundling Hospital v. Crane*, [1911] 2 K. B. 367. In the first case the instrument was intended by the deceased to be operative, though not in a testamentary way. But a Will, though formally executed as a Will, will not be valid if there were no *animus testandi*; and therefore it may be shown in evidence that it was written in jest, or without any intention of making an operative Will: *Nicholls v. Nicholls*, 2 Phillim. 180; *Lister v. Smith*, 3 Sw. & Tr. 282; *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109. See also, as to the necessity of there being an *animus testandi*, Shep. Touch. 404; Swinb. Pt. 1, s. 3, pl. 23; *Taylor v. D'Egville*, 3 Hagg. 206. But if an instrument, upon the face of it, is manifestly executed as a Will, the Court of Probate cannot look at its effect; it must have legal operation, without regard to the intention as to effect: *King's Proctor v. Daines*, 3 Hagg. 231; *Philips v. Thornton*, 3 Hagg. 752.

Onus of proof
of animus
testandi.

But no case has gone the length of deciding, that because an instrument cannot operate in the form given to it, it *must* operate as a Will. The true principle to be deduced from the authorities appears to be, that, if there is proof, either in the paper itself, or from clear evidence *dehors* (*d*), first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a Will; secondly, that death was the event that was to give effect to it; then whatever may be its form, it may, assuming that there is execution in compliance with the Wills Act, be admitted to probate as testamentary (*e*). And there seems to be this distinction in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character; that the first will be entitled to probate, unless they are proved not to have been written *animo testandi*; whilst, in the latter, the *animus* must be proved by the party claiming under them (*f*).

It should be observed that if a document, although in the form of a Will, bears upon its face the positive assertion by the person executing it that it is not meant to operate as a legal Will, it will not be held to be a valid testamentary document (*g*).

(*d*) If the instrument be equivocal or silent, it may be proved by extrinsic circumstances to have been intended to operate as a testamentary disposition: *King's Proctor v. Daines*, 3 Hagg. 221; *Jones v. Nicholay*, 2 Robert. 292, where Sir H. Jenner Fust said, "Evidence to show *quo intuitu* has always been received in a Court of Probate": *In the goods of English*, 3 Sw. & Tr. 586; *Cock v. Cooke*, L. R. 1 P. & D. 241; *Robertson v. Smith*, L. R. 2 P. & D. 43; *In the goods of Slinn*, 15 P. D. 156. See also *post*, Pt. I. Bk. IV. Ch. II. § v., for other cases as to the reception of parol evidence respecting the testator's intention.

(*e*) *King's Proctor v. Daines*, 3 Hagg. 221; *Jones v. Nicholay*, 2 Robert. 288; *In the goods of Robinson*, L. R. 1 P. & D. 384; *Milnes v. Foden*, 15 P. D. 105, 107. It would seem that it is not an objection to probate that it is asked in respect only of part of a document: *Doe d. Cross v. Cross*, 8 Q. B. 714. But see *In the goods of Robinson, ubi supra*: from which case it would seem that no part of an instrument which is wholly irrevocable can be treated as testamentary. A duly executed paper in these terms, "I wish my sister to have my bank-book for her own use," was held to be testamentary, the Court being satisfied on the evidence that the deceased at the time of its execution intended it to take effect after her death, and not as a present deed of gift: *Cock v. Cooke*, L. R. 1 P. & D. 241; *In the goods of Coles*, L. R. 2 P. & D. 362.

(*f*) *King's Proctor v. Daines*, 3 Hagg. 221; *Griffin v. Ferrard*, 1 Curt. 199; *Coventry v. Williams*, 3 Curt. 790, 791; *Thorncroft v. Lashmar*, 2 Sw. & Tr. 479.

(*g*) *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109.

It would seem that prior to the Wills Act where a testator by a subsequent paper said he had bequeathed by a former instrument that which he had not bequeathed, the subsequent paper would have been held a disposition, and admitted to probate, as being a declaration of his Will at the time he made it, to dispose by the Will, not in terms expressing that it is then his Will, but that he disposed of it before (*h*): and now a codicil duly executed containing a similar statement would appear to have a like effect (*i*).

But it is essentially requisite that the instrument should be made to *depend upon the event of death*, as necessary to *consummate* it; for where a paper directs a benefit to be conferred *inter vivos*, without reference, expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary (*k*).

A document which is in form testamentary and properly executed, may nevertheless be proved not to be a Will on the ground that the requisite *animus testandi* was wanting. Thus where two sisters made Wills in favour of each other, and by mistake each signed the Will of the other, both Wills were held invalid (*l*).

The Court does not confine the testamentary disposition to a single instrument: but will consider several, of different natures and forms, as constituting altogether the Will of the deceased (*m*).

(*h*) *Druce v. Denison*, 6 Ves. 397, in the judgment of Lord Eldon, C., *Bibin v. Walker*, Ambl. 661; Godolph. Pt. 3, ch. 3, s. 3; *Jordan v. Fortescue*, 10 Beav. 259; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19. But see *Frederick v. Hall*, 1 Ves. 396.

(*i*) *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19, 24.

(*k*) *Glynn v. Oglander*, 2 Hagg. 428; *King's Proctor v. Daines*, 3 Hagg. 218; *Shingler v. Pemberton*, 4 Hagg. 359; *Tompson v. Browne*, 3 My. & K. 32. And see *In the goods of Robinson*, L. R. 1 P. & D. 384.

(*l*) *In the goods of Hunt*, 3 P. & D. 250; *In the estate of Meyer*, [1908] P. 353.

(*m*) See *post*, p. 116, as to the admission to probate of two or more instruments of different date as together containing the Will of the deceased. Where probate is granted of two or more testamentary papers, as together containing the last Will of the deceased, it is the practice to make the grant to all the executors named in the several papers: *In the goods of Morgan*, L. R. 1 P. & D. 323; *In the goods of Harris*, L. R. 2 P. & D. 83.

They must depend on the death of the maker for consummation.

Signing wrong Will by mistake.

Several instruments may constitute altogether a Will.

SECTION IV.

The Language of a Will.

Language of
a testamen-
tary paper.

A testamentary document requires no special form of words (*n*).

"Wishes"
and "re-
quests"
deemed
sufficient.
Language
of Will
immaterial.

The rules of the Court are not more scrupulous with respect to the language, than the nature, of instruments which it allows to operate as testamentary. It is not held necessary that the directions contained in them, how property should be disposed of in the event of death, should be in direct and imperative terms: wishes and requests have been deemed sufficient (*o*).

It is immaterial in what language a Will is written, whether in Latin, French, or any other tongue (*p*). If the testator be a domiciled Englishman, the effect of the foreign tongue employed can only be looked at in order to ascertain what are the equivalent expressions in English (*q*).

SECTION V.

The Materials with which a Will may be Written, and of the Person who may be the Writer: and herewith of a Will prepared by a Legatee.

Pencil Will,
or alterations
in Will.

There are scarcely any restrictions in the Ecclesiastical Law, with respect to the materials on which, or by which, a testamentary document may be executed (*r*). Thus a Will or Codicil, or any part thereof, may be made or altered in pencil as well as in ink (*s*). But when the question was, as before the Wills Act it often used to be, whether the testator intended the paper as a final declaration of his mind, and as testamentary,

(*n*) *Oldroyd v. Harvey*, [1907] P. 326.

(*o*) *Passmore v. Passmore*, 1 Phillim. 218, in Sir J. Nicholl's judgment. Generally speaking, when property is given absolutely to any person, and the same person is by the giver "recommended," or "entreated," or "requested," or "wished" to dispose of that property in favour of another, the recommendation, request, or wish is held imperative and to create a trust. Such words may or may not create a trust, but whether they do so or not must be determined by the context: *Cormiskey v. Bowring-Hanbury*, [1905] A. C. p. 89. The Court will be guided by the intention and not by any particular words: *Re Williams*, [1897] 2 Ch. at p. 14; *Re Hamilton*, [1895] 2 Ch. at p. 373.

(*p*) Swinb. Pt. 4, s. 25, pl. 3. See as to a Will in a foreign language, *Foubert v. Cresseron*, Show. P. C. 194; *Re Cliff's Trusts*, [1892] 2 Ch. 229.

(*q*) *Reynolds v. Kortright*, 18 Beav. 417.

(*r*) Swinb. Pt. 4, s. 25, pl. 2.

(*s*) *Rymes v. Clarkson*, 1 Phillim. 35.

or whether it was merely preparatory to a more formal disposition, the material with which it was written became a most important circumstance. And it has been held that the general presumption and probability are, that where alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute (*t*). And the same presumption prevails when the question arises as it occasionally does in respect of Wills made since the Wills Act (*u*).

Presumption that pencil alterations are deliberative and ink alterations are final.

By the civil law, if a person wrote a Will made in his own favour, the instrument was rendered void (*x*). That rule has not been adopted by the law of England, which only holds that where the person who prepares the instrument or conducts its execution is himself benefited by its dispositions, this fact, unless it be merely the case of a small legacy to him as executor, or other such circumstance, creates a suspicion of improper conduct and renders necessary very clear proof of volition and capacity as well as of a knowledge by the testator of the contents of the instrument (*y*). Nor does the law of this realm determine that the act is necessarily void, even where the person making the Will in his own favour is the agent and attorney of the testator; but the suspicion of improper conduct is thereby, for obvious reasons, greatly increased (*z*).

Where a Will is written or prepared by a party in his own favour:

when he is the agent and attorney of the testator.

(*t*) *Hawkes v. Hawkes*, 1 Hagg. 322; *Parkin v. Bainbridge*, 3 Phil. 321.

(*u*) *In the goods of Hall*, L. R. 2 P. & D. 256; *In the goods of Adams*, *ib.* 367.

(*x*) Dig. lib. 48, t. 10, s. 15, and lib. 34, s. 8.

(*y*) *Paske v. Ollat*, 2 Phillim. 324; *Ingram v. Wyatt*, 1 Hagg. 391. But it must not be understood that the rule is that direct evidence that the testator knew the contents is necessary; circumstantial evidence may be sufficient for this purpose: *Raworth v. Marriott*, 1 M. & K. 643. And knowledge will, as in other cases, *prima facie* be presumed on proof of capacity and execution: *Barry v. Butlin*, 2 Moo. P. C. 480. And even where there is affirmative evidence of knowledge by reason of the Will having been read over to a testator, competent in mind, before execution, there is no unyielding rule of law (especially where the ingredient of fraud enters into the case) shutting out all further inquiry: *Fulton v. Andrew*, L. R. 7 H. L. 465, per Cairns, L. C.; but these circumstances afford a strong presumption of knowledge and approval: *Gregson v. Taylor*, [1917] P. 256. Undue influence, if suggested, must be supported by affirmative proof: *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

(*z*) *Ingram v. Wyatt*, 1 Hagg. 391; *Dufaur v. Croft*, 3 Moo. P. C. C. 136; *Parfitt v. Lawless*, L. R. 2 P. & D. 462; *In the estate of Osmont*, [1914] P. 129. In some cases the conduct of a professional man who prepared a Will has been held fraudulent, and the Will inoperative, by reason of his allowing the testator to remain in ignorance, which influenced the Will in favour of himself. See *Segrave v. Kirwan*, 1 Beat. 157; *Hindson v. Wetherill*, 1 Sm. & G. 609; 5

Rule in *Barry v. Butlin*.

i. *Onus probandi* on party propounding Will.

ii. The Court should be vigilant in cases where the party writing or preparing the Will takes a benefit thereunder.

This doctrine was fully considered by the Lords of the Judicial Committee of the Privy Council, in the case of *Barry v. Butlin* (a). In delivering the judgment of their Lordships in that case, Parke, B., made the following observations: "The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal, and have been acquiesced in on both sides. These rules are two; the first is, that the *onus probandi* lies upon the party propounding a Will, who must satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator; the second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true Will of the deceased. These principles, to the extent that I have stated, are well established: The former is undisputed; the latter is laid down by Sir John Nicholl, in substance, in *Paske v. Ollat*; *Ingram v. Wyatt*; and *Billinghurst v. Vickers*; and is stated by that very learned and experienced judge to have been handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of *Baker v. Batt* (b). Their Lordships are fully sensible of the wisdom of this rule, and of the importance of its practical application on all occasions. At the same time they think it fit to observe, especially as there has been some discussion upon this point towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal, and capable of leading into error in the investigation and decision of questions of this nature. It is said that, where the party benefited prepares the Will, 'the presumption and *onus probandi* is against the

De G. M. & G. 301; *Walker v. Smith*, 29 Beav. 394. See also *Bulkeley v. Wilford*, 2 Cl. & F. 102; *Walkers v. Thorn*, 22 Beav. 547; *post*, Pt. I. Bk. VI. Ch. I.

(a) 2 Moo. P. C. 480. See also *Fulton v. Andrew*, L. R. 7 H. L. 448; *Goodacre v. Smith*, L. R. 1 P. & D. 359; *Brown v. Fisher*, 63 L. T. 465; *Low v. Guthrie*, [1909] A. C. 278.

(b) 2 Moo. P. C. C. 317. See also *Hitchings v. Wood*, *ib.* 355, 436.

instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper': and that, 'where the capacity is doubtful, there must be proof of instructions or reading over.' If by these expressions the learned judge meant merely to say, that there are cases of Wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them extending to clear proof of actual knowledge of the contents by the supposed testator, and that the instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the proposition so understood. In all probability, the learned judge intended no more than this. But if the words used are to be construed strictly: if it is intended to be stated, as a rule of law, that in every case in which the party preparing the Will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is thereupon required from the party propounding the Will, we feel bound to say that we conceive the doctrine to be incorrect. The strict meaning of the term '*onus probandi*' is this; that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him in all cases, this *onus* is imposed on the party propounding a Will; it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are presumed: and it cannot be, that the simple fact of the party who prepared the Will being himself a legatee, is, in every case and under all circumstances, to create a contrary presumption; and to call upon the Court to pronounce against the Will, unless additional evidence is produced to prove knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition:—A man of acknowledged competence and habits of business, worth 100,000*l.*, leaves the bulk of that property to his family, and a legacy of 10*l.* or 50*l.* to his confidential attorney, who prepared his Will: Would this fact throw the burden of proof of actual cognizance by the testator of the contents of the Will on the party propounding it, so that, if such proof were not supplied, the Will would be pronounced against? The answer is obvious—it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a Will with a legacy to

Meaning of
term *onus
probandi*.

himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case; in some of no weight at all, as in the case suggested; varying according to the circumstances, for instance the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the Will is to be in the shape of instructions for or reading over the instrument; they form, no doubt, the most satisfactory, but they are not the only satisfactory, description of proof by which the cognizance of the contents of the Will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a Will without it; but it has no right in every case to require it. I have said thus much upon the rules of law applicable to this case, with the concurrence of all their Lordships who heard the argument, not particularly with a view to the decision of this case, but in order to prevent any misconception upon a subject of so great practical importance. At the same time their Lordships wish it to be distinctly understood, that, entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation."

Rule in *Barry*
v. Butlin
approved in
subsequent,
cases.

In the subsequent case of *Durling v. Loveland* (c), Sir H. Jenner Fust, referring to these passages in the judgment of Mr. Baron Parke, observed that he acceded to every one of the doctrines and principles there laid down, but that he was not aware that the Prerogative Court had ever acted on any other or different.

The rule in *Barry v. Butlin* is not confined to the single case in which a Will is prepared by or on the instructions of a person taking large benefits under it, but extends to all cases where circumstances exist which excite the suspicion of the Court; and whenever such circumstances exist, and whatever their nature

may be, it is for those who propound the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document; and it is only where this is done that the onus is thrown on those who oppose the Will, to prove fraud or undue influence or whatever else they may rely on to displace the case made for proving the Will (*d*). In cases of this kind the person opposing is *primâ facie* justified in pleading undue influence and fraud, and, though unsuccessful, ought not to be condemned in costs unless the circumstances of the case be such as to render it unreasonable for him to raise such issues (*e*). A plea of undue influence ought never to be put on the record unless there are reasonable grounds for putting it forward (*f*).

SECTION VI.

Nuncupative Wills and Codicils.

A nuncupative testament is when the testator, without any writing, doth declare his Will before a sufficient number of witnesses (*g*). Before the Statute of Frauds a nuncupative testament was of as great force and efficacy (except for lands, tenements, and hereditaments) as a written testament (*h*). But as Wills of this description were liable to great impositions, and might occasion many perjuries, the Statute of Frauds (29 Car. II. c. 3) laid them (except when made by "any soldier being in actual military service, or any mariner or seaman being at sea") under so many restrictions and imposed so many requisites that they fell into disuse (*i*). And now by the Wills Act (1 Vict.

All nuncupative Wills (made on and after Jan. 1, 1838) are invalid:

(*d*) *Tyrrell v. Painton*, [1894] P. 151, 157 (C. A.); *ante*, p. 83, n. (*y*).

(*e*) *Wilson v. Bassil*, [1903] P. 239.

(*f*) *Spiers v. English*, [1907] P. 122; *Low v. Guthrie*, [1909] A. C. 278.

(*d*) Swinb. Pt. 1, s. 12, pl. 1; Godolph. Pt. 1, c. 4, s. 6. It is called Nuncupative, says Swinburn, *a nuncupando*, i.e., *nominando*, of naming; because when a man maketh a nuncupative testament, he must name his executor and declare his whole mind before witnesses: *ib.* pl. 2. According to the civil law, the appointment of an executor was the essence of a Will; and if he were appointed by word of mouth, although many legacies were made and written in a Will, and many things were expressed to be done, it was considered a nuncupative Will only: Swinb. Pt. 1, s. 12, pl. 6; Godolph. Pt. 1, c. 4, s. 7.

(*h*) Swinb. Pt. 1, s. 12, pl. 3; Godolph. Pt. 1, c. 4, s. 6.

(*i*) It appears from the Preface to the Life of Sir Leoline Jenkins, that he claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English army the full benefit of the testamentary privileges of the Roman army: 3 Curt. 531.

except those
made by
soldiers or
mariners.

c. 26, s. 9), applying to all Wills made on or after 1st day of Jan., 1838, it is enacted that no Will shall be valid unless it shall be in writing and executed in manner provided by the Act (k). The exception, however, in favour of soldiers and mariners or seamen has been continued by the 11th section of the Wills Act, which provides and enacts that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

Construction
of this
exception:
as to soldiers:

This privilege, as it respects soldiers, has been held to be confined, by the insertion of the words "actual military service," to those who are *on an expedition*: And consequently it has been decided, that the Will of a soldier made while he was quartered in barracks, either at home (l) or in the colonies (m), is not privileged. The same was held as to the Will of a soldier made at Bangalore, who died whilst on a tour of inspection of the troops under his command (n). But where the deceased was on his way from one regiment to another, both of which were in actual military service, it was held that his Will was privileged (o). The term "soldier" extended to persons in the military service of the East India Company (p). As "actual military service" commences at the time of mobilisa-

(k) As to the law prior to the above date relating to nuncupative Wills, see the earlier Editions of this Work, Pt. I. Bk. II. Ch. II. § vi.

(l) *Drummond v. Parish*, 3 Curt. 522. See *In the goods of Hiscock*, [1901] P. 78, in which case *Drummond v. Parish* was discussed. And see *ante*, p. 12, as to Wills of infant soldiers or seamen.

(m) *White v. Repton*, 3 Curt. 818. See *In the goods of Phipps*, 2 Curt. 368; *In the goods of Johnson*, 2 Curt. 341.

(n) *In the goods of Hill*, 1 Robert. 276.

(o) *Herbert v. Herbert*, Dea. & Sw. 10. See also *S. P.*, *In the goods of Thorne*, 4 Sw. & Tr. 36, where an officer was ordered with a detachment of his regiment to Africa, for the purpose of joining a military expedition into the interior, and his Will, made before the expedition left the British settlement, and in contemplation of the intended march, was held privileged. See also *In the goods of Hiscock*, [1901] P. 78; *Gatward v. Knee*, [1902] P. 99, in which a letter written after mobilisation was held privileged as a soldier's Will; and see *In the goods of Gordon*, 21 T. L. R. 653. See also *May v. May*, [1902] P. 103, n.; *In the goods of Scott*, [1903] P. 243, in which case a declaration made by a soldier on active service at the instance of the military authorities, who made a note of it at the time, to the effect that in the event of his death he desired his effects to be credited to one of his sisters, whom he named, was held a valid testamentary document. The affidavit on which the application for probate is made must be explicit: *ib.*

(p) *In the goods of Donaldson*, 2 Curt. 386. The term also extends to a nurse employed on a hospital ship: *Re Stanley*, [1916] P. 192.

tion, so it does not cease until the full conclusion of the operations (q).

The Will of a soldier or seaman in order to come within the exception must be of a testamentary nature, but it is enough if it gives expression to his wishes as to the disposition of his property in the event of his death (r); and he can by such Will exercise a general power of appointment, even though he be a minor (s), but he cannot appoint a guardian (t). The Will of a soldier will be revoked by his subsequent marriage (u).

Formerly a nuncupative Will made by a sailor was not valid unless made "at sea" (x), though in some cases sailors' Wills have been held to be within the spirit of the exception in the Act though the testators were not actually at sea (y). The powers of seamen have, however, now been enlarged by sect. 2 of the Wills (Soldiers and Sailors) Act, 1918 (z), which extends sect. 11 of the Wills Act, 1837, to any member of the naval and military forces, not only when at sea, but also where if he had been a soldier he would be on actual military service.

As to the construction of the words "mariner or seaman," in the exception; it has been held that the purser of a man-of-war is within this description, and it should seem that it includes the whole service, applying equally to superior officers up to the commander-in-chief, as to a common seaman, being at sea (a). The section has been held to apply also to *merchant* seamen (b).

(q) *Re Limond*, [1915] 2 Ch. 240.

(r) *Re Stable*, [1919] P. 7; *Re Godman*, [1920] W. N. 130.

(s) *Re Wernher*, [1918] 2 Ch. 82.

(t) *In the goods of Tollemache*, [1917] P. 246.

(u) *In the estate of Wardrop*, [1917] P. 54.

(x) *Euston v. Seymour*, cited *per curiam*, 2 Curt. 339; 3 Curt. 530; *In the goods of Anderson*, [1916] P. 49; *In the estate of Thomas*, 62 S. J. 784.

(y) *In the goods of Lay*, 2 Curt. 375. So also a Will made by a mariner serving on board H.M.S. "Excellent" whilst she was permanently stationed in Portsmouth Harbour, was held to be the Will of a "mariner or seaman being at sea" within sect. 11 of the Wills Act: *In the goods of McMurdo*, L. R. 1 P. & D. 540. See also *In the goods of Saunders*, L. R. 1 P. & D. 16; *In the goods of Austen*, 2 Robert. 611.

(z) 7 & 8 Geo. 5, c. 58; *In the goods of Yates*, [1919] P. 93; *Re Godman*, *supra*.

(a) *In the goods of Hayes*, 2 Curt. 338. A surgeon in the Navy is a "mariner or seaman" within the section: *In the goods of Saunders*, L. R. 1 P. & D. 16. As to the meaning of the term "seaman and mariner" in sect. 2 of stat. 28 & 29 Vict. c. 72, see *post*, Pt. I. Bk. iv. Ch. III.

(b) *Morrell v. Morrell*, 1 Hagg. 51; *In the goods of Milligan*, 2 Robert. 108; *In the goods of Parker*, 2 Sw. & Tr. 375.

as to mariners.

Construction of words "mariner or seaman."

Persons
within the
exception may
make their
Wills though
under age.

It has been the practice to admit infant soldiers' Wills to probate, and though the practice is not justified by *In the goods of Farquhar* (c), upon which it is based, yet it has been recognised, and such a Will, while the probate remains unrevoked, must be treated as valid (d).

Provisions of
stat. 28 & 29
Vict. c. 72,
as to Wills of
seamen.

With respect to the making and probate of the Wills of petty officers and seamen in the King's service, and the non-commissioned officers of marines, and marines serving on board a ship in the King's service, several statutes have been passed containing regulations calculated to counteract the frauds and impositions to which they are liable. These, however, have been repealed, and other provisions for the same purpose substituted, by the statute 28 & 29 Vict. c. 72, which will be pointed out, when the subject of the probate of Wills is considered (e). With respect to the Wills of merchant seamen, regard must be had to the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60)(f).

(c) 4 Notes of Cas. 651.

(d) *Re Wernher*, [1918] 1 Ch. 339.

(e) See *post*, Pt. I. Bk. IV. Ch. III. See also *ante*, p. 35.

(f) See *ante*, p. 37, and *post*, Pt. I. Bk. V. Ch. II. § IV.

CHAPTER THE THIRD.

THE REVOCATION OF WILLS.

THERE has already been occasion to observe that a Will is in all cases whatever a revocable instrument. For though a man make his Testament and last Will irrevocable in the strongest and most express terms, yet he may revoke it; because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable (a). A Will is, therefore, said to be *ambulatory* until the death of the testator (b).

Ambulatory
and revocable
nature of a
Will.

It has already been stated that a mutual and conjoint Will is unknown to the testamentary law of this country (c). One ground of objection to such an instrument as testamentary, is its irrevocability. However, such a Will may, in some cases, be enforced in equity as a compact. In *Dufour v. Pereira* (d), Mrs. Camilla Rancer, the wife of Mr. Rancer, being entitled to a legacy under the Will of her aunt, she and her husband agreed to make a mutual Will, which they did, and both executed it; the husband died; the wife proved his Will, and afterwards made another Will. And the question was, whether it was in the power of the wife to revoke the mutual Will. Lord Camden, C.: "This question arises on a mutual Will of the husband and wife; the Will is jointly executed by them; what the wife disposes of, is the residue of her aunt's estate, given to her by her Will. I do not find the cases go so far, as to consider a legacy to a wife, as excluding the husband by implication: but there is no occasion to determine that question:

Mutual Will:
whether ever
irrevocable in
equity.

(a) *Vynior's case*, 8 Co. 82, a; Swinb. Pt. 7, s. 14, pl. 2.

(b) The making of a Will is but the inception of it, and it doth not take effect till the death of the testator: for *omne testamentum morte consummatum est, et voluntas est ambulatoria usque ad extremum Vitæ exitum*. Then it would be against the nature of a Will to be so absolute, that he who makes it cannot countermand it: *Forse and Hembling's case*, 4 Co. 61, b.

(c) *Ante*, p. 7; and see *post*, p. 133.

(d) 1 Dick. 419; *Stone v. Hoskins*, [1905] P. 194.

the question is, as the husband by the mutual Will assents to his wife's right, and makes it separate, whether the second Will by the wife is to be considered as void. It struck me at first, more from the novelty of the thing than its difficulty. The case must be decided by the laws of this country. The Will was made here; the parties lived here; and the funds are here. Consider how far the mutual Will is binding, and whether the accepting of the legacies under it by the survivor, is not a confirmation of it. I am of opinion it is. It might have been revoked by both jointly, it might have been revoked separately, provided the party who intended it had given notice to the other of such revocation. But I cannot be of opinion, that either of them could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another Will. It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not. The defendant, Camilla Rancer, hath taken the benefit of the bequest in her favour by the mutual Will, and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion, the last Will of the wife, so far as it breaks in upon the mutual Will is void. And I declare, that Mrs. Camilla Rancer, having proved the mutual Will, after her husband's death, and having possessed all his personal estate, and enjoyed the interest thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual Will; and therefore let the necessary accounts be taken" (e).

This case was succeeded by that of *Walpole v. Lord Orford* (f), where the Will of George, Earl of Orford, made in 1756, and Horace Lord Walpole's codicil of the same date, made in concert, constituted, in effect, a mutual Will. Horace Lord Walpole died in 1757, without revoking his part of the mutual Will, namely the codicil of 1756; George Earl of Orford died in 1791, when it appeared that he had made a codicil in 1776; and this by reason of a reference to his last Will, bearing date in 1752, was construed a revocation of his part of the mutual Will, namely, the Will of 1756. A case was

(e) See this judgment also reported in 2 Hargr. Jurid. Arg. 272; 2 Hargr. Jurid. Exerc. 101.

(f) 3 Ves. 402.

then raised in equity, that the mutual Will of 1756 became irrevocable on the death of Lord Walpole in 1757, though it was admitted to have been revocable by either during the joint lives of Lord Walpole and Lord Orford, with notice to the other. And the judgment of Lord Camden in *Dufour v. Pereira*, was mainly relied on in support of that position. Lord Loughborough, however, refused to enforce the compact of the mutual Will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness, of the compact; so that it leaves the principle of Lord Camden's decision in *Dufour v. Pereira* wholly unshaken (*g*).

A contract to leave property by Will may be enforced by specific performance against all who claim under the deceased contractor as volunteers (*h*), but such a contract by a donee of a general power of appointment will not be specifically enforced, although damages may be recovered for breach of it (*i*). Such a contract on the part of a donee of a special power is void (*k*), but a covenant not to exercise such a power is free from objection and operates as a release (*l*).

Contracts to leave property by Will.

And here it may be right to mention that, although a Will is always revocable notwithstanding a contract not to revoke it, yet such a contract is not illegal and is binding if made for good consideration and in such form as to comply with the Statute of Frauds (*m*), and damages are recoverable for the breach thereof (*n*); but a contract not to revoke a Will cannot be specifically enforced. A mere representation of an intention, however, as distinguished from a contract, is not binding, although such representation may have been intended to influence the conduct and action of the contemplated beneficiary, and in fact have been acted on by him (*o*). Although an agreement not to revoke a Will may give rise to a claim for

Of contracts not to revoke.

(*g*) See 1 Add. 278, note by the learned Reporter to *Hobson v. Blackburn*, and also Mr. Hargrave's remarks on the case of *Walpole v. Lord Orford*, in 2 Jurid. Arg. 272; 2 Jurid. Ex. 101. See also *Fortescue v. Hennah*, 19 Ves. 67; *Chester v. Urwick*, 23 Beav. 407; *Stone v. Hoskins*, [1905] P. 194.

(*h*) *Synge v. Synge*, [1894] 1 Q. B. 466, 470; Fry, 245.

(*i*) *Re Parkin*, [1892] 3 Ch. 510, 517; *Re Lawley*, [1903] A. C. 411.

(*k*) *Palmer v. Locke*, 15 C. D. 294, 301; *Re Bradshaw*, [1902] 1 Ch. 436.

(*l*) *Re Evered*, [1910] 2 Ch. 147, 157.

(*m*) *Hammersley v. De Biel*, 12 Cl. & F. 45; *Robinson v. Ommanney*, 23 C. D. 285.

(*n*) *Re Parkin*, *ubi supra*.

(*o*) *Maddison v. Alderson*, 8 A. C. 467; *Humphreys v. Green*, 10 Q. B. D. 148; *Re Fickus*, [1900] 1 Ch. 331.

damages, or may be enforced by a declaration of trust, the Probate Division is not the proper forum in which to seek such relief (p).

1 Vict. c. 26,
s. 20. No
Will to be
revoked but
by another
Will or
codicil, or by
a writing
executed like
a Will, or by
destruction :

By stat. 1 Vict. c. 26, s. 20, it is enacted, "that no Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, [*i.e.*, by marriage under sect. 18,] or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same (q) and executed in the manner in which a Will is hereinbefore required to be executed (r), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

1 Vict. c. 26,
s. 21. No
alteration in
a Will shall
have any
effect unless
executed as
a Will.

And by sect. 21, it is further enacted, "that no obliteration, interlineation, or other alteration made in any Will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; but the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will."

A testator
cannot
authorize a
Will to be
destroyed
after his
death.

It may here be observed that, by reason of the above enactment contained in the 20th section, a testator cannot delegate his power of revoking the Will, by inserting in it a clause conferring on another an authority to destroy it after his death (s).

(p) *In the estate of Heys*, [1914] P. 192.

(q) Where a testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words signed by himself and attested by two witnesses, "we are witnesses of the erasure of the above," it was held that the codicil was revoked, for the words were "a writing declaring an intention to revoke," and within this section: *In the goods of Gosling*, 11 P. D. 79.

(r) The writing need not be testamentary, but unless it is testamentary it will not be admitted to probate: *In the goods of Fraser*, L. R. 2 P. & D. 40; *In the goods of Eyre*, [1905] 2 Ir. R. 540; *Toomer v. Sobinska*, [1907] P. 106. See also *In the goods of Hicks*, L. R. 1 P. & D. 683.

(s) *Stockwell v. Ritherdon*, 1 Robert. 661, per Sir H. Jenner Fust.

SECTION I.

Revocation by Destruction, Burning, Tearing, Cancellation, or Obliteration.

It will be observed, that the 20th section of the Wills Act confines the modes of total revocation by means of any act done to the instrument itself, to "burning, tearing, or otherwise destroying" (t). 1 Vict. c. 26,
s. 20 :

It is obvious, also, that a part only of a Will may be revoked in the manner here described; for the statute says that "no Will, or any part thereof, shall be revoked otherwise than, &c., or by the burning, tearing, or otherwise destroying the same," &c. (u).

And as to partial revocation, it is further enacted by sect. 21, s. 21. that no obliteration, interlineation, or other alteration, made after the execution, shall be valid or have any effect (except so far as the words or effect of the Will before such alteration shall not be apparent), unless such alteration shall be executed in like manner as is required for the execution of the Will.

By the sixth section of the Statute of Frauds, with respect to devises of lands, revocations of this nature were confined to "burning, cancelling, tearing, or obliterating the same." Statute of
Frauds, s. 6.

This section, however, did not extend to Wills of personal property; but with respect to them it was merely provided, by sect. 22, that no Will concerning any goods or chattels or personal estate should be repealed or altered "by any words." Statute of
Frauds, s. 22.

The 34th section of the Wills Act enacts, that "this Act shall not extend to any Will made before the 1st day of January, 1838"; but the interpretation of the Act, which has been adopted by the Prerogative Court, and approved by the Privy Council, is, that the operation of the Act was meant only to be suspended with respect to the execution of such Wills as were already made at the passing of the Act and those made between the passing of the Act and the 1st of January, 1838, and that a Will made before the statute came into operation is not exempted from the necessity of complying with the provisions To what cases
the Wills Act
extends:
every act done
to a Will
after Jan. 1,
1838, must be
in compliance
with the
statute
though the
Will be made
before that
date.

(t) See *ante*, p. 94.

(u) *Clarke v. Scripps*, 2 Robert. 563, 567, by Sir J. Dodson; *In the goods of Woodward*, L. R. 2 P. & D. 206. And see *Leonard v. Leonard*, [1902] P. 243, 248.

of the new law *with respect to any act done to it after that period (x).*

Presumption
as to when
alterations,
&c. shall be
presumed to
have been
made.

It has been established by the judgment of the Judicial Committee of the Privy Council in *Cooper v. Bockett (y)*, which has been followed in several subsequent cases (z), that where unattested alterations appear on the face of a Will, and no information can be given, and there are no circumstances, one way or the other, to show when the alterations were made, the presumption is that the alterations were made *after* the execution of the Will, and the fact that a date is affixed to the alteration is not evidence to rebut the presumption (a). In order to rebut this presumption, declarations of the testator, before the execution of his Will, that he intended to provide by his Will for a person who would be unprovided for without the alteration in question, are admissible evidence; but not declarations, after the execution, that the alteration had been made previously (b). Where a Will has been prepared in the first instance with the amounts of the legacies in blank, and the amounts involving, for want of space, some interlineations and alterations, have been afterwards filled in by the testator himself, the Court will presume that they were filled in previous to execution: for it cannot be supposed that the execution was prior to the insertion of the legacies (c); and the mere circum-

(x) *Hobbs v. Knight*, 1 Curt. 768; *Croker v. Lord Hertford*, 4 Moo. P. C. 339, 356.

(y) 4 Notes of Cas. 685; *S. C.*, 4 Moo. P. C. 419.

(z) *Gann v. Gregory*, 3 De G. M. & G. 780, by Lord Cranworth; *Doe v. Palmer*, 16 Q. B. 747; *In the goods of James*, 1 Sw. & Tr. 238; *In the goods of White*, 30 L. J. P. & M. 55. But in *Williams v. Ashton*, 1 Johns. & H. 115, 118, Wood, V.-C., said he did not think it was quite a correct mode of stating the law, to say that alterations in a Will are presumed to have been made at one time or at another; but that the correct view is that the *onus* is cast on the party who seeks to derive an advantage from an alteration in a Will, to adduce some evidence from which a jury may infer that the alteration was made before the Will was executed.

(a) *In the goods of Adamson*, L. R. 3 P. & D. 253, 256.

(b) *Doe v. Palmer*, 16 Q. B. 747; *Dench v. Dench*, 2 P. D. 60. But where the deceased executed a Will and codicil, the latter referring to the former by its date, the name of the executor appointed by the Will being written on an erasure, the Court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the Will and codicil to such executor: *In the goods of Sykes*, L. R. 3 P. & D. 26. It is not sufficient to prove that the testator told the witnesses at the time of attestation that he had made some alterations in his Will, but did not allow them to see what the alterations were: *Williams v. Ashton*, 1 Johns. & H. 115.

(c) *Birch v. Birch*. 1 Robert. 675; *In the goods of Cadge*, L. R. 1 P. & D. 543.

stance of the amount of a legacy, or name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, "or other alteration" within the meaning of the statute; nor does any presumption arise against the Will having been duly executed as it appears (*d*). So where a Will and codicil were in the testator's custody, and the Will is found mutilated after his death, in the absence of evidence, the presumption is that it was mutilated by the testator, after the execution of the codicil (*e*). Consequently, if the Will is dated on or after Jan. 1st, 1838, it is obvious that the alterations also must be taken to have been made after the new Act came into operation. The presumption is not at all varied or altered by the circumstance of a codicil to the Will having been duly executed: The presumption of law must still be that the alterations were made after the execution of the codicil (*f*); unless there be proof or internal evidence to the contrary, in which case the codicil, being a republication of the Will, would republish the Will with the alterations (*g*).

Presumption in absence of evidence where Will found mutilated after testator's death.

Presumption as to alterations in Will dated on or after 1 Jan. 1838.

Presumption not altered by fact that codicil has been duly executed.

As to Wills dated *before* the 1st of Jan., 1838, it does not appear to be settled, whether the presumption is that alterations were made before or after the Wills Act came into operation; for though they must be taken to have been made after the execution of the Will, it does not follow that they were made on or after Jan. 1st, 1838 (*h*). It may be observed that in the instance of an unattested Will without date, where the case is bare of circumstances from which the time when it was made may be inferred, it has been held that the presumption is that it was made before the Act came into operation (*i*).

No presumption as to alterations where Will is dated before 1 Jan. 1838.

Presumption in absence of evidence in case of unattested undated Will.

(*d*) *Greville v. Tylee*, 7 Moo. P. C. 320. See also *In the goods of Swindin*, 2 Robert. 192. Where some trifling alterations and interlineations appeared on the face of a holograph Will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert that, in his opinion, they were written at the same time as the rest of the Will, on that evidence the Court admitted them to probate: *In the goods of Hindmarch*, L. R. 1 P. & D. 307.

(*e*) *Christmas v. Whinyates*, 3 Sw. & Tr. 81.

(*f*) *Lushington v. Onslow*, 6 Notes of Cas. 183; *In the goods of Bradley*, 5 Notes of Cas. 186.

(*g*) *In the goods of Sykes*, L. R. 3 P. & D. 26; *Tyler v. Merchant Taylors Co.*, 15 P. D. 216; *In the Goods of Heath*, [1892] P. 253. But see *Re Hay*, [1904] 1 Ch. 317.

(*h*) See *In the goods of Pennington*, 1 Notes of Cas. 399; *Wynn v. Heveringham*, 1 Coll. 630.

(*i*) *Pechell v. Jenkinson*, 2 Curt. 273, *ante*, p. 54. And on the

Act of revocation before
1 Jan. 1838.

With respect to what amounted to an act of destruction, sufficient to operate as a total revocation, if made before the 1st of Jan., 1838, see the earlier Editions of this Work, Pt. I., Bk. II., ch. 3, § 1.

What shall
amount to
a revocatory
act of de-
struction if
done after
1 Jan. 1838.
Meaning of
"otherwise
destroying."

With respect to acts of destruction or cancellation done after the Wills Act came into operation: It will be observed, that the words "cancelling" and "obliterating," which occur in the Statute of Frauds, are omitted in the 20th section of the Wills Act, and that the words "otherwise destroying" are substituted. It has been considered that these latter words mean modes of destruction *ejusdem generis*, as cutting, throwing into water, or the like, and, therefore, exclude cancelling (*k*). And it has been argued, that a still narrower construction ought to prevail, *viz.*, that a revocation of a Will under the new law, by any mode short of actual destruction or annihilation, can only be by burning or tearing. In *Hobbs v. Knight* (*l*), Sir Herbert Jenner Fust held, that the excision of the name of the testator amounted to a revocation of the Will under the terms "otherwise destroying" (*m*); and that it was not necessary, in order to operate a revocation, that the whole instrument should be destroyed; it was sufficient if the entirety or essence of the thing were destroyed: In that case, the name of the testator, an essential part of the Will, had been removed: And the learned judge proceeded to state that the inclination of his opinion was, that a testator might revoke his Will by obliterating his signature to it, if the obliteration amounted to a destruction; if the testator had so carefully obliterated it that it was perfectly illegible: And further, by parity of reasoning, that if the names of the attesting witnesses were taken away by the testator *animo revocandi*, it would be a good destruction of the Will under the Act: The learned judge likewise observed, that if the signature had been burnt or torn out, that would be clearly sufficient to revoke: and that if it were necessary to determine the point, he

authority of this case, and of *In the goods of Pennington*, *ante*, note (*h*), Sir C. Cresswell held, *hæsitans*, that the presumption is the same as to alterations: *In the goods of Streaker*, 28 L. J. P. M. & A. 50. See also *Benson v. Benson*, L. R. 2 P. & D. 172. As to presumptions in the case of alterations in a Will of an officer in actual service, see *In the goods of Tweedale*, L. R. 3 P. & D. 204.

(*k*) Sugden's Essay, p. 46.

(*l*) 1 Curt. 768.

(*m*) It is sufficient revocation within the section if the signature of the testator is scratched out as with a knife: *In the goods of Morton*, 12 P. D. 141.

thought it would not be difficult to hold, that cutting is equivalent to tearing. This decision was cited by Sir John Dodson in *Clarke v. Scripps* (n); and that learned judge said, that he quite agreed with Sir H. J. Fust, that cutting and tearing are equivalent acts (o).

Cancellation by striking through with a pen is not a revocation under the Wills Act (p), even though the striking through be done *animo revocandi* (q). A symbolical burning, tearing, or destruction will not do: there must be the act as well as the intention. All the destroying in the world without intention will not revoke a Will: nor all the intention in the world without destroying: there must be the two (r).

It was held, in the construction of the Statute of Frauds, that in order to operate a revocation of a Will, it was not necessary that the instrument itself should be consumed or torn to pieces (s). It was decided, however, that there must be an actual burning of the Will to some extent, in order to effect a revocation of this nature; and that an intention and attempt to burn was insufficient (t). There seems to be no reason why these decisions should not be applied to the Wills Act. But assuming them to be adopted as authorities in its construction, it is difficult to state any precise rule with respect to the extent to which the burning or tearing of the Will must go, in order to effect a revocation: In giving judgment, in *Doe v. Harris*, Lord Denman observed, that doubt might be entertained now, whether the proof given in *Bibb v. Thomas* would be sufficient as to the acts of burning and tearing: Patteson, J., said,

Striking through with pen insufficient.

Actual burning necessary: intention and attempt to burn insufficient.

(n) 2 Robert. 563, 570, 575.

(o) Where, however, the Will was found with the testator's original signature erased, but another signature appeared at a short distance beneath, Dr. Lushington held, on the facts and circumstances deposed to, that the original signature had not been erased *animo revocandi* as required by the new Wills Act, and that in the probate the original signature must be restored, and the second omitted: *In the goods of King*, 2 Robert. 403. See also *In the goods of Coleman*, 2 Sw. & Tr. 314. But where on the death of the deceased a Will was found the signature to which had been cut out but gummed to its former place, it was held that the presumption of revocation was not rebutted, although there was evidence of declarations by the deceased of intention to benefit his wife by Will: *Bell v. Fothergill*, L. R. 2 P. & D. 148.

(p) *Stephens v. Tapprell*, 2 Curt. 458.

(q) *In the goods of Rose*, 4 Notes of Cas. 101; *In the goods of Brewster*, 29 L. J. P. & M. 69.

(r) Per James, L.J., *Cheese v. Lovejoy*, 2 P. D. 251, 253.

(s) *Bibb v. Thomas*, 2 W. Black. 1043.

(t) *Doe v. Harris*, 6 A. & E. 209; S. C., 2 Nev. & P. 615.

The burning must be such as to destroy the entirety of the Will.

Above view approved in subsequent cases.

"There must be, at all events, a partial burning of the instrument itself: I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the Will is": Williams, J., said, "The Will must be torn or burnt, and the question will always be whether that was done with intention to cancel; how much should be burnt, or whether the Will should be torn into more or fewer pieces, it is not necessary to lay down": Coleridge, J., said, "The question is put, whether the Will must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such an injury with intent to revoke *as destroys the entirety of the Will*: because it may then be said, that the instrument no longer exists as it was": And Sir Herbert Jenner Fust, in giving judgment in *Hobbs v. Knight* (u), cited and adopted the view of the question thus taken by Mr. Justice Coleridge as applicable to the construction of the new statute.

The same view has been taken by the Courts in several subsequent cases; as in *Price v. Powell* (x), where the Barons of the Exchequer regarded the tearing off the seal of a Will *animo revocandi* as amounting to a revocation of it by reason of its being a destruction of its entirety. So in *Williams v. Tyley* (y), where there was the usual statement in the witnessing clause at the end of a Will that the testator had set his hand to the preceding pages, Wood, V.-C., held, that the testator had thereby made the signatures on those pages a part of his Will, and that the whole Will was revoked by tearing them off, *animo revocandi*; and his Honour relied on the above-mentioned case of *Price v. Powell*, and approved of the principle on which it had been decided. Again, *In the goods of Harris* (z), where a testatrix, having executed her Will by signing her name at the foot of each sheet, cut off the signatures on the first five sheets, and cancelled her own signature at the end of the last sheet, writing underneath that she had cancelled the Will on a certain day: The last sentence in her Will in effect referred to the signatures she had cut off as giving validity to the Will: And it was thereupon considered by Sir J. P. Wilde that the Will was destroyed in its entirety, and could not be admitted to probate. So *In the goods of Lewis* (a), the Will was held by Sir C. Cresswell to be revoked by tearing off the signatures and

(u) *Ante*, p. 98.

(y) *Johns*, 529.

(x) 3 H. & N. 341.

(z) 3 Sw. & Tr. 485.

(a) 1 Sw. & Tr. 31.

attestation. And in another case, before the same judge, *In the goods of Gullan* (b), where the testator had subscribed each of the several sheets of which his Will consisted at the foot of each sheet in the presence of the attesting witnesses, who thereupon also subscribed each sheet in his presence, and on his death two of the middle sheets of the Will only could be found; it was held that the signatures at the end of the Will, being the only ones made in compliance of the statute, having been destroyed, the whole Will was revoked, and the sheets that had been found, though duly attested, could not be admitted to probate.

It must be here observed, that if the act of destruction or cancellation be inchoate and incomplete, it will not amount to a revocation. Thus in *Doe v. Perkes* (c), it appeared that the testator, being moved with a sudden impulse of passion against one of the devisees under his Will, conceived the intention of cancelling it, and of accomplishing that object by tearing: Having torn it twice through, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him: He then proceeded no further, and after having fitted the pieces together, and found that no particular word had been obliterated, he said, "It is a good job it is no worse." Upon this evidence, it was left to the jury to say whether the testator had done all he intended, or whether he was prevented from completing the act of destruction he intended: They found that he was so prevented, and the Court of King's Bench held, that their verdict was right, and that there was no revocation of the Will (d).

Inchoate and incomplete cancellation shall not revoke.

In accordance with this authority, the case of *Elms v. Elms* (e) was decided. In that case the testator tore the Will almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing Will before making another: Sir Cresswell Cresswell laid down the law to be, that in order to revoke a Will by tearing it, it is not necessary to rend the Will into more pieces than it originally consisted of, but that it is sufficient if the testator intended the

(b) *Ibid.* 125.

(c) 3 B. & A. 489. See accord. *In the goods of Colberg*, 2 Curt. 832; *Giles v. Warren*, L. R. 2 P. & D. 401; *In the goods of Brassington*, [1902] P. 1.

(d) See observations of Mr. Justice Holroyd, before whom this case was tried, in summing up the evidence to the jury: *Gow*, 186.

(e) 1 Sw. & Tr. 155.

tearing actually done of itself to work a revocation without any further act—in other words, if when he ceased tearing, he had done all that he contemplated doing for the purpose of revoking: But the learned judge, having regard to all the evidence in the case, was not satisfied that the testator did so intend, and therefore held that the Will was not revoked.

Act of revocation must take place in testator's presence:

and by his direction.

It should be borne in mind that to operate a revocation, the act of "burning, tearing, or otherwise destroying," is required by the 20th section to be done by the testator or by some person *in his presence*, and *by his direction* (f). Therefore, in a case where a codicil had been burnt by the testator's order with intent to revoke, *but not in his presence*, probate was decreed of a draft copy of the codicil (g). Where the Will of a testatrix was destroyed in her presence, but *without her consent or authority*, by a relative, and subsequently the testatrix, though pressed to do so, refused to make a new Will, saying that she could not bring her mind to it, and that it must remain as it was, it was contended, in order to establish a revocation, that the language used by the testatrix amounted to a ratification of the destruction of the Will, and was therefore equivalent to a destruction in her presence and by her direction with the intention of revoking it. Mr. Justice Butt, however, in his judgment said he doubted very much whether that was a tenable argument in any circumstances, but that it was not necessary for him to decide the point as he held that the words attributed to the testatrix did not amount to a ratification of the destruction (h).

Effect (under the Wills Act, s. 20) of mutilating part of the Will.

Intention of testator governs extent of the operation.

It has already been pointed out, that under the 20th section of the Wills Act, a part only of a Will may be revoked in the manner described (i). Accordingly, it has been held that if the testator after the execution of the Will destroy part only of it, by tearing or cutting away, or cutting out portions of it, *animo revocandi* as to the parts so removed, this will amount to a revocation *pro tanto* (k). But with respect to the destruction of a part, it should seem that the intention with which the act is done must govern the extent of operation to be attributed to the act, and determine whether it shall effect the revocation of the

(f) See *ante*, p. 94.

(g) *In the goods of Dadds*, Dea. & Sw. 290.

(h) *Mills v. Millward*, 15 P. D. 20; *Gill v. Gill*, [1909] P. 157.

(i) *Ante*, p. 95.

(k) *In the goods of Lambert*, 1 Notes of Cas. 131; *In the goods of Cooke*, 5 Notes of Cas. 390; *Clarke v. Scripps*, 2 Robert. 563. 572.

whole instrument, or only of some and what portion of it (*l*). And the intention to revoke wholly or only in part, may be evidenced either by proof of the expressed declaration of the testator of his intention in doing the act, or by proof of circumstances from which it may be inferred, or by the state and condition to which the instrument has been reduced by the act itself (*m*).

Evidence of intention to revoke wholly or only in part.

As to partial revocation by cancellation or obliteration prior to the Wills Act, see the earlier Editions of this Work, Pt. I., Bk. II., Ch. 3, § 1, and the case of *Swinton v. Bailey* (*n*).

Partial revocation by obliteration, destruction, interlineation or other alteration under the old law.

With respect to alterations and obliterations made since the Wills Act came into operation (1st Jan., 1838), it is required (sect. 21), in order to give effect to any obliteration, interlineation, or other alteration, that such alteration shall be executed as is required for the execution of the Will (*o*), with this difference, that the signature of the testator and the subscription of the witnesses (*p*) need not be at the foot or end of the Will, but may be made in the margin or some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will (*q*).

Under Wills Act, s. 21; formalities necessary for obliterations and other alterations :

(*l*) *Clarke v. Scripps*, 2 Robert. 567; *In the goods of Woodward*, L. R. 2 P. & D. 206; *Leonard v. Leonard*, [1902] P. 243; *ante*, p. 95.

(*m*) *Clarke v. Scripps*, 2 Robert. 568; *Williams v. Jones*, 7 Notes of Cas. 106; *In the goods of Maley*, 12 P. D. 134; *Christmas v. Whynates*, 3 Sw. & Tr. 81; *Treloar v. Lean*, 14 P. D. 49; *In the goods of Woodward*, L. R. 2 P. & D. 206, the mere cutting off three lines from the beginning of the Will was held, in the absence of other circumstances, not to show an intention to revoke the whole Will.

(*n*) 1 Ex. D. 110; 4 App. Cas. 70.

(*o*) Where a testatrix by her codicil confirmed a duly executed and attested Will, it was held that no effect could be given to unattested alterations made between the date of the Will and the codicil, unless on the construction of the codicil it appeared that the testatrix intended to confirm the Will as altered: *Re Hay*, [1904] 1 Ch. 317.

(*p*) The initials of a testatrix and the attesting witnesses in the margin of a Will opposite interlineations are sufficient to render the interlineations valid: *In the goods of Blewitt*, 5 P. D. 116; *In the goods of Wilkinson*, 6 P. D. 100.

(*q*) Where a testator at the beginning of his Will disposed of certain leasehold houses for the benefit of his children, and the words describing one of such houses were struck through by a pen, and at the end of the Will a clause was interlined bequeathing such house to his wife, and under the signature of the deceased and the witnesses a memorandum duly signed and attested was added, to the effect that the above words had been struck out for the benefit of the testator's wife, Sir J. Hannen held, that the memorandum referred to the interlineation as well as to the obliteration: *In the goods of Treeby*,

consequences
of complete
obliteration :

Section 21 however contains an exception in this respect, *viz.*, “except so far as the words and effect of the Will before such alteration shall not be apparent.” Consequently, if the words are completely obliterated, so that it cannot be made out what they originally were, the obliteration is valid, and probate must then be granted, as if there were blanks in the Will (*r*).

In *In the goods of Horsford* (*s*), where a strip of paper had been pasted over a whole legacy, Sir James Hannen in the course of his judgment said: “It has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by aid of glasses. Chemical agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think it would be proper to adopt such means. I think that the word ‘apparent’ in the 21st section means apparent on the face of the instrument in the condition in which it was left by the testator, and that if he had had recourse to extraordinary means to obliterate what he had written then this Court is not bound to take any steps to undo what he has done. The Statute does not draw any distinction between modes of obliteration. The effacement of the original writing as performed by the testator, by pasting paper over it, is complete, and I see no reason why the Court should remove the pasted paper used as the instrument of obliteration, rather than ink used for the same purpose. I shall therefore give no directions on the subject so far as the Will is concerned, and assuming that the words covered over cannot be ascertained by inspection the probate must go with those parts

L. R. 3 P. & D. 242. See, further, as to the position of the signature of the testator and attesting witnesses, *In the goods of Wilkinson*, 6 P. D. 100.

(*r*) In a case on motion, Sir H. Jenner Fust ordered that the erasures in a Will should be carefully examined in the Registry, with the help of glasses, by persons accustomed to writing, to ascertain whether they could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank: *In the goods of Ibbetson*, 2 Curt. 337. See also *In the goods of Beavan*, 2 Curt. 369; *In the goods of James*, 1 Sw. & Tr. 238; *In the goods of Brazier*, [1899] P. 36. Generally speaking, the Court of Probate will not, in the first instance, take upon itself to decide whether the words obliterated can or cannot be made out. If it be asserted in an allegation that they are capable of being distinguished on the face of the Will, the Court will refer such an allegation to proof, and then pronounce its judgment according to the testimony which may be offered at the hearing: *Townley v. Watson*, 3 Curt. 739.

(*s*) L. R. 3 P. & D. 211.

in blank" (t). Where, however, a testatrix had written some words at the back of a codicil and had subsequently pasted a piece of blank paper over them, the Court ordered that the paper should be removed in order to ascertain whether what had been written amounted to a revocation of the codicil (u).

And it has been held that the Court is not at liberty to resort to evidence *aliunde*; e.g. to refer to a draft copy or to the instructions for the Will (x). It was the intention of the Legislature in this respect, that if a testator shall take such pains to obliterate certain passages in his Will, and shall so effectually accomplish his purpose, that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid, as if done according to the stricter forms mentioned in the Act of Parliament (y).

In the earlier view taken by the Prerogative Court of this clause, it was considered as a consequence of this construction, that where a legacy was given, and the amount was afterwards obliterated by the testator and another sum written by him over the obliteration, by way of substitution, but without the attestation required by the Act, although the alteration would be wholly ineffectual, and the legacy would be pronounced for as originally given, should the Will continue legible in this respect (z), yet if the obliteration should be such, that it could not be made out upon inspection of the Will what was the amount of the sum originally given, the legacy would be lost altogether, because the unattested substitution was not a valid alteration, and the original bequest was revoked by the obliteration which had rendered it illegible (a).

It was suggested, in a former Edition of this Treatise, that cases of this sort might admit of the application of the doctrine of dependent relative revocations (b), and it is now settled, that where a testator entirely erases the original words, intending to revoke a legacy by substituting a different sum from that originally given, and such substituted legacy is not effectually

evidence
aliunde
inadmissible:

consequences
of complete
obliteration
with un-
attested
substitution.

Case when
evidence
aliunde is
admissible.

(t) See also *Ffinch v. Coombe*, [1894] P. 191, as to the meaning of the word "apparent."

(u) *In the goods of Gilbert*, [1893] P. 183.

(x) *Townley v. Watson*, 3 Curt. 761; *In the goods of McCabe*, L. R. 3 P. & D. 94, 96.

(y) *Ib.*

(z) *In the goods of Beavan*, 2 Curt. 369.

(a) *In the goods of Rippin*, 2 Curt. 332. See also *In the goods of Brooke*, *ib.* 343; *In the goods of Livock*, 1 Curt. 906.

(b) See *infra*. And see *Brooke v. Kent*, 3 Moo. P. C. 334.

given, the original legacy is not revoked, and evidence *aliunde* is admissible to show what the words were (c).

The acts prescribed for revocation must be done *animo revocandi*.

Mutilation by testator who has become insane.

The Wills Act provides (s. 20) that the acts prescribed for the revocation of Wills must be done "with the intention of revoking the same." This enactment appears to have been unnecessary, inasmuch as the law was fully established to the same effect at the time of the passing of the Act. An act done without the intention to revoke is wholly ineffectual (d). It is clear that an insane person cannot have any intention. Where there is proof that the Will was duly executed by a testator who afterwards became insane, the *onus* of showing that it had been mutilated by the testator when of sound mind is on the party alleging the revocation (e).

Presumption of law as to *animus revocandi*.

Questions of revocation of Wills have always been regarded as questions depending on the intention; every fact of apparent revocation may in some sort be said to be equivocal (f). Cancelling and obliterating have always been considered peculiarly as equivocal acts. The presumption of law is, however, in favour of the *animus revocandi* (g), but this presumption may be repelled by evidence, showing that the *animus revocandi* did not exist. As if a man were to throw ink upon his Will instead of sand, though it might be a complete defacing of the instrument, it would be no revocation: or suppose a man, having two Wills of different dates by him, should direct the former to be cancelled, and, through mistake,

(c) *Soar v. Dolman*, 3 Curt. 121; *Townley v. Watson*, *ib.* 769. See *In the goods of Bedford*, 5 Notes of Cas. 188; *In the goods of Harris*, 1 Sw. & Tr. 536; *In the goods of Parr*, 29 L. J. P. M. & A. 70; *In the goods of Horsford*, L. R. 3 P. & D. 211; *In the goods of Greenwood*, [1892] P. 7. The principle of dependent relative revocation applies to a case where a testator had so entirely erased the name of a legatee that it was no longer apparent, and had substituted another name for it: *In the goods of McCabe*, L. R. 3 P. & D. 94.

(d) *Clarkson v. Clarkson*, 2 Sw. & Tr. 497; *In the goods of Thornton*, 14 P. D. 82, where a testatrix, being under an erroneous impression that a codicil had not been duly executed, directed it to be torn up and sent to her solicitor to be recopied, but died before she could re-execute it, it was held that probate of the codicil might be allowed.

(e) *Harris v. Berrall*, 1 Sw. & Tr. 153. See *ante*, p. 28; *Sprigge v. Sprigge*, L. R. 1 P. & D. 608; *Benson v. Benson*, L. R. 2 P. & D. 172, 176. Where a person when suffering from *delirium tremens* tore up his Will, and on his recovery said that he was mad to do it, the Court held that there was no revocation: *Brunt v. Brunt*, L. R. 3 P. & D. 37; *In the goods of Brassington*, [1902] P. 1.

(f) *Smith v. Cunningham*, 1 Add. 455.

(g) *Rickards v. Mumford*, 2 Phillim. 28; *In the goods of Lewis*, 27 L. J. P. M. & A. 31.

the person directed should cancel the latter, such an act would be no revocation of the latter Will (*h*).

This principle, that the effect of the obliteration, cancelling, &c., depends upon the mind with which it is done, having been pursued in all its consequences, has introduced the doctrine of dependent relative revocations, in which the act of cancelling, &c., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not.

Dependent
relative
revocations :

cancellation
dependent
upon the
efficacy of
another act.

Thus, in *Onions v. Tyrer* (*i*), a man made a second Will, to the use of the same person to whom he had devised the land by the first Will, with a variation only in the name of one of the trustees: but which second Will was not good, because not duly attested according to the Statute of Frauds: After so executing the second Will, he cancelled the first by tearing off the seal: One question was whether the cancelling of the former Will was a revocation thereof within the Statute of Frauds and Perjuries: And it was held, that it was not; because there was no self-substituting independent act, but done to accompany, or in way of affirmation of the second Will: It was done from an opinion that the second Will had actually revoked the first, which induced the testator to tear that, as of no use: Therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it; for, though a man might, by the Statute of Frauds, as effectually destroy his Will by tearing or cancelling it, as by making a second Will, yet, when he intended to revoke the first Will by the second, and it was insufficient for that purpose, and the tearing and cancelling the first was only in consequence of his opinion that he thereby made good the second Will, the tearing and cancelling should not destroy the first, but it ought to be considered as still subsisting and unrevoked (*k*). The principle of this decision was recognized by Lord Mansfield in the case of *Burtenshaw v. Gilbert* (*l*); by Lord Ellenborough in *Perrott v. Perrott* (*m*);

(*h*) *Onions v. Tyrer*, 1 P. Wms. 345, in Lord Cowper's judgment; *Burtenshaw v. Gilbert*, Cowp. 52, in Lord Mansfield's judgment; 1 Saund. 280, *b. c.* note to *Duppa v. Mayo*.

(*i*) 2 Vern. 742; *Re Bernard*, [1916] 1 Ch. 552.

(*k*) It would have made no difference if the latter Will had been in favour of another person from the former: see Sir Wm. Grant's judgment in *Ex parte the Earl of Ilchester*, 7 Ves. 379.

(*l*) Cowp. 52.

(*m*) 14 East, 440.

and by Sir John Nicholl in *Lord John Thynne v. Stanhope* (n). So in the case of *Hyde v. Hyde* (o), where the testator, having given instructions for some immaterial alterations in a properly executed Will, read over a draft of a new Will made according to such instructions, and having signed such draft, tore the seals from his old Will, under the impression that his new Will was completely executed so as to pass lands; this was held to have been done *sine animo cancellandi*, and therefore to be no revocation of the original Will. So again in *Hyde v. Mason* (p) where the testator by alterations and obliterations in his Will appeared only to design a new Will, *which, as he never perfected, it was held the first ought to stand.*

In the case of *Winsor v. Pratt* (q), Dallas, C. J., in giving his judgment, observed: "The effect of cancelling depends upon the validity of the second Will, and ought to be taken as one act done at the same time; so that if the second Will is not valid, the cancelling of the first, being dependent thereon, ought to be looked upon as null and inoperative." And in a case in the Prerogative Court, an executor, having, in pencil, altered a Will (by the direction of the testator, who approved of it when so altered), and then cancelled it, only in order that another might be drawn up, the preparation of which was prevented by the death of the testator, Sir John Nicholl held, that such cancellation, being preparatory to the deceased making a new Will, and conditional only, was not a revocation (r).

Cancellation, under the influence of a mistake in point of law, seems to be equally inoperative to revoke, as if made under a mistake of fact. "If a man," said Lord Ellenborough, in the

Cancellation
made under
a mistake
of law.

(n) 1 Add. 53.

(o) 1 Eq. Cas. Abr. 409.

(p) Vin. Abr. Devise (R. 2), pl. 17; *S. C.*, *nomine Limbery v. Mason*, Com. Rep. 451.

(q) 2 Brod. & Bing. 650; *S. C.*, 5 Moore, 484.

(r) *In the goods of Applebee*, 1 Hagg. 143; *Dancer v. Crabb*, L. R. 3 P. & D. 98, 104. See also *In the goods of De Bode*, 5 Notes of Cas. 189; accord. *In the goods of Eeles*, 2 Sw. & Tr. 600; *Dixon v. Solicitor to the Treasury*, [1905] P. 42. In these cases the parties interested consented. See also for cases where the revocation was held to be absolute and not dependent, *In the goods of Mitcheson*, 32 L. J. P. M. & A. 202; *In the goods of Gentry*, L. R. 3 P. & D. 80; *Eckersley v. Platt*, L. R. 1 P. & D. 281. For further cases where the revocation was held to be dependent, see *Short v. Smith*, 4 East, 419; *Kirke v. Kirke*, 4 Russ. Ch. C. 435; *Locke v. James*, 11 M. & W. 901; *In the goods of Middleton*, 3 Sw. & Tr. 583; *Powell v. Powell*, L. R. 1 P. & D. 209.

case of *Perrott v. Perrott* (s), "cancel his Will under a mistake in point of fact, that he has completed another, when he really has not, as was the case in *Hyde v. Hyde*, the cancellation is void: and if he cancel it, under a mistake in law, that a second Will (complete as to the execution) operates upon the property contained in the first, when from some clerical rule it really does not; shall this be deemed a valid cancellation?" (t).

It was laid down by Lord Alvanley in *Ex parte Lord Ilchester* (u) that the above cases completely established the general principle that where it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation (x).

General principle of the cases.

In connection with this principle, it has been established (as will hereafter fully appear)(y), that a subsequent Will made under the impulse of a mistaken notion of facts will not revoke a former one.

A Will is not revoked by a subsequent Will made under mistake of fact.

But where the second disposition fails for want of capacity in the legatee to take, it appears to be established (though it has been thought difficult to make a satisfactory distinction) that the revocation would be effectual (z).

The rule differs when the gift fails by incapacity of the legatee.

A codicil is, *primâ facie*, dependent on the Will, and before the passing of the Wills Act the principle was that a codicil fell to the ground with the Will when the Will was revoked, but that if it could be established that the testator intended the

When a destruction or mutilation of the Will is a revocation of the codicil.

(s) 14 East, 440.

(t) *James v. Shrimpton*, 1 P. D. 431. See also *Dancer v. Crabb*, L. R. 3 P. & D. 98.

(u) 7 Ves. 372.

(x) See also the same rule laid down by Sir Wm. Grant in the same case, 7 Ves. 279. For other cases illustrating this rule, see *Scott v. Scott*, 1 Sw. & Tr. 258; *In the goods of Cockayne*, Dea. & Sw. 177; *Dickinson v. Stidolph*, 11 C. B. N. S. 341; *Williams v. Tyley*, Johns. 535, per Wood, V.-C.; *In the goods of Middleton*, 3 Sw. & Tr. 583; *Powell v. Powell*, L. R. 1 P. & D. 209. The rule applies whether the revocation is dependent upon the execution of a Will in substitution or upon the erroneous assumption of the validity of a Will executed before: *Powell v. Powell*, *ubi supra*: questioning on this point, *Dickinson v. Swatman*, 30 L. J. P. & M. 84. Compare *In the goods of Weston*, L. R. 1 P. & D. 633, in which case Lord Penzance refused to hold that the revocation was dependent.

(y) *Post*, p. 123.

(z) *Tupper v. Tupper*, 1 Kay & J. 665; *Quinn v. Butler*, L. R. 6 Eq. 225; cf. *Re Bernard*, [1916] 1 Ch. 552.

codicil to stand by itself notwithstanding the revocation of the Will, the Court would give effect to the codicil (a). The cases on the point decided since the passing of the Wills Act are not very easy to reconcile. In *the goods of Savage* (b), Lord Penzance, following a previous decision of his own in *Black v. Jobling* (c), said that the Court could not in the teeth of the language of the 20th section of the Wills Act lay down the proposition that a codicil is revoked by the mere fact of the revocation of the Will. He was of opinion that the matter had not been properly considered in the earlier decisions of *Clogstoun v. Walcott* (d) and *Grimwood v. Cozens* (e), and having regard to the words of the Wills Act, which in his opinion were imperative, the learned judge held that when a testator had once executed a testamentary paper, that paper will remain in force unless revoked in the particular manner mentioned in the 20th section: And in the case of *In the goods of Turner* (f) his Lordship decided to the same effect.

But it may be doubted whether the judgment of his Lordship is not too widely expressed. In the subsequent case of *In the goods of Bleckley* (g), where, however, the codicil was on the same sheet of paper as the Will, Sir James Hannen in his judgment says: "The question whether the deceased meant to revoke this codicil depends upon the intention to be gathered from the circumstances of the case, and they satisfy me that he meant to revoke both the Will and codicil." In *Sugden v. Lord St. Leonards* (h), the same judge expressed his opinion that a plea to the effect that the testator had intended in revoking his Will to also revoke his codicils was a good plea in law. Indeed, in an earlier case than those above mentioned (i), Lord Penzance himself would appear to have been

(a) *Coppin v. Dillon*, 4 Hagg. 361; *Grimwood v. Cozens*, 2 Sw. & Tr. 364; *In the goods of Dutton*, 3 Sw. & Tr. 66; *Barrow v. Barrow*, 2 Cas. temp. Lee, 335; *Medlycott v. Assheton*, 2 Ad. 231; *Taggart v. Hooper*, 1 Curt. 286; *In the goods of Halliwell*, 4 Notes of Cas. 400; *In the goods of Ellis*, 33 L. J. P. M. & A. 27; *In the goods of Greig*, L. R. 1 P. & D. 72.

(b) L. R. 2 P. & D. 78.

(c) L. R. 1 P. & D. 685.

(d) 5 Notes of Cas. 623.

(e) 2 Sw. & Tr. 364.

(f) L. R. 2 P. & D. 403. And see *Falle v. Godfray*, 14 A. C. 70, 76.

(g) 8 P. D. 169.

(h) 1 P. D. 154.

(i) *In the goods of Greig*, 1 P. & D. 72.

of much the same opinion as Sir James Hannen. In the case of *Gardiner v. Courthope* (*k*), Mr. Justice Butt followed the above-mentioned case of *Black v. Jobling* (*l*), but he distinguished the case before him from *In the goods of Bleckley*, saying that it was perfectly true that when a testamentary document in the possession of a deceased was not forthcoming at his death, the presumption of law was that it was destroyed with the intention of revoking it, but that to go further and hold that the Will was destroyed with the intention to revoke it because it was not found among the deceased's papers, and then to say that the codicil which was preserved amongst the deceased's papers was therefore a document the deceased intended to destroy also, was, he thought, going beyond the bounds authorised by the law. He therefore could not find it was the intention of the deceased to destroy the codicil, and that being so the case was not within the decision in *In the goods of Bleckley* (*m*). It is submitted, therefore, that the principle since the Wills Act is that a codicil will not be impliedly revoked merely by the destruction or mutilation of the Will, and that the codicil notwithstanding remains effectual unless it appears that in revoking the Will the testator thereby intended to revoke the codicil as well.

If a Will be executed in duplicate, and the testator keeps one part himself, and deposits the other with some other person; and the testator mutilates or destroys the part in his own custody, it is a revocation of both (*n*). The presumption of law in such case, liable of course to be rebutted by evidence, is, that the destruction or mutilation of the one duplicate was done *animo revocandi* as to both (*o*).

Duplicate
Wills :

presumption
that the
destruction or
mutilation of
one revokes
the other :

same pre-
sumption

And in *Pemberton v. Pemberton* (*p*), Lord Chancellor

(*k*) 12 P. D. 14.

(*l*) L. R. 1 P. & D. 685.

(*m*) 8 P. D. 169.

(*n*) *Boughey v. Moreton*, 2 Cas. temp. Lee, 532; *S. C.*, 3 Hagg. 191; *Rickards v. Mumford*, 2 Phillim. 23; *Colvin v. Fraser*, 2 Hagg. 266.

(*o*) Swinburne seems to have been of opinion that it lay on the party relying on the revocation to prove the *animus*, otherwise the cancellation of one duplicate would not affect the other. See Pt. 7, s. 16, pl. 4. But the modern authorities, cited in the preceding note, have now settled that the *animus* is to be presumed till the contrary is proved. As to the presumption when a testator destroys a duplicate in the possession of his solicitor, and preserves that in his own custody, see *Payne v. Trappes*, 1 Robert. 583, 591.

(*p*) 13 Ves. 310. And in that case it also appears that Lord Ellen-

where both instruments are in testator's possession :

Erskine laid down that the same presumption holds, though in a much weaker degree, where both the instruments are in the testator's possession: And, further, that in a third case, where the testator, having both duplicates in his possession, alters one, and then destroys that which he has altered, there also the same presumption holds, though weaker still (*q*).

an interlineation and a codicil to the same effect; by cancelling one, the other is cancelled :

In another case under the old law, where a father, after having made his Will, being displeased with his son, by an interlineation of his Will, excluded him from all share in his property but one shilling, and also by a codicil made for that purpose, declared his determination to the same effect; but afterwards being reconciled to his son, the testator cancelled the codicil, by drawing his pen across it, but the interlineation was left standing in the Will; it was held by Sir W. Wynne, in the Ecclesiastical Court, and afterwards by Sir W. Grant, M.R., that the cancellation of the codicil had the effect of cancelling the interlineation (*r*).

Proof of mutilation : if a Will in testator's custody be found mutilated, the presumption is, that he mutilated it *animo revocandi* : if it cannot be found, the presumption is, that he destroyed it *animo revocandi* :

If a testament was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is to be presumed to have done the act (*s*); and it has already appeared that the law further presumes that he did it *animo revocandi* (*t*). So where a testator had a Will in his own custody, and that Will cannot be found after his death, the presumption is that he destroyed it himself; it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority (*u*), for that would be presuming a crime (*x*). But this

borough and Sir James Mansfield had each, in charging juries, stated the law to this effect.

(*q*) It was urged by counsel in the course of the argument, that in this third case, as soon as one part has been altered, the two parts cease to be duplicates, and the altered one then becomes a new Will of the latest date, and revokes all others. See, further, as to the revocation of duplicates, *Roberts v. Round*, 3 Hagg. 548; *Doe v. Strickland*, 8 C. B. 724; *Atkinson v. Morris*, [1897] P. 40.

(*r*) *Utterson v. Utterson*, 3 Ves. & Beam. 122.

(*s*) *Swinb. Pt. 7*, s. 16, pl. 5; *Davies v. Davies*, 1 Cas. temp. Lee, 444; *Lambell v. Lambell*, 3 Hagg. 568; *In the goods of Lewis*, 1 Sw. & Tr. 31.

(*t*) *Ante*, p. 106; 3 Hagg. 568. And the law is not different though the testator appears to have gummed the signature on again in its original place: *Bell v. Fothergill*, L. R. 2 P. & D. 148.

(*u*) *Rickards v. Mumford*, 2 Phillim. 23; *Colvin v. Fraser*, 2 Hagg. 266; *Lillie v. Lillie*, 3 Hagg. 184; *Wargent v. Hellings*, 4 Hagg.

(*x*) By the Larceny Act, 1916, s. 6, any person who steals a Will is guilty of felony.

presumption may be rebutted by evidence leading to the conclusion that the testator did not do that which, in the absence of evidence to the contrary, it is presumed he had done (y). And this presumption holds with respect to duplicate Wills: Hence if a Will was executed in duplicate, and the testator has the custody of one part, and it cannot be found after his death; the presumption of law is, that he destroyed it *animo revocandi*; and both parts are consequently to be considered revoked, unless such presumption be rebutted (z).

so where the testator has the custody of one of two duplicate Wills.

There can be no doubt, that if a Will duly executed is destroyed in the lifetime of the testator without his authority, it may be established, upon satisfactory proof being given of

An unrevoked Will, which has been unduly mutilated or

245; *Welch v. Phillips*, 1 Moo. P. C. 299; *Brown v. Brown*, 8 E. & B. 882; *In the goods of Mitcheson*, 32 L. J. P. M. & A. 202. In *Sugden v. Lord St. Leonards*, 1 P. D. 154, 217, Cockburn, C. J., says: "Where a Will is shown to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the Will has been destroyed by the testator for the purpose of revoking it; but, of course, that presumption may be rebutted by the facts. Although *presumptio juris*, it is not *presumptio de jure*, and, of course, the presumption will be more or less strong according to the character of the custody which the testator had over the Will." See also *Allan v. Morrison*, [1900] A. C. 604. It would seem that if the Will is traced out of the deceased's possession and custody, it rests with the other party, either to show by the same sort of evidence that it came again into his possession or custody, or that it was destroyed by his direction, or with his privity or consent. See reporter's note in *Lillie v. Lillie*, *ubi supra*, p. 185.

(y) Thus this presumption may be rebutted by showing that he had no opportunity of so doing, or that it has been lost or destroyed without his privity or consent: *Lillie v. Lillie*, 3 Hagg. 184, 185; *Wargent v. Hellings*, 4 Hagg. 245, 249. Or by declarations by the testator of goodwill towards the parties benefited by the Will, or of an adherence to the Will, and the contents of the Will itself: *Patten v. Poulton*, 1 Sw. & Tr. 55; *Saunders v. Saunders*, 6 Notes of Cas. 518; *Johnson v. Lyford*, L. R. 1 P. & D. 546; *Sugden v. Lord St. Leonards*, 1 P. D. 154. Or by a consideration of the contents of the Will itself: *ib.* p. 176. For the purpose of rebutting the presumption, declarations of the testator to various members of his family down to a few days before his death expressive of his satisfaction at having settled his affairs, and intimating that his Will was left with his attorney, were held to have been properly admitted: *Whiteley v. King*, 17 C. B. N. S. 756; *Sugden v. Lord St. Leonards*, 1 P. D. 154. This presumption does not apply to a case where the testator became insane after the execution and continued insane until his death: *Sprigge v. Sprigge*, L. R. 1 P. & D. 608. See *ante*, p. 106. Nor does it arise unless the Court is satisfied by unimpeachable evidence that the Will was not in existence at the time of the testator's death: *Finch v. Finch*, L. R. 1 P. & D. 371. The evidence to rebut the presumption must be clear and satisfactory: *Eckersley v. Platt*, L. R. 1 P. & D. 281. See also *In the goods of Shaw*, 1 Sw. & Tr. 62; *Harris v. Knight*, 15 P. D. 170; *In the goods of Phibbs*, [1917] P. 93.

(z) *Colvin v. Fraser*, 2 Hagg. 266.

destroyed,
may be estab-
lished :

its having been so destroyed, and also of its contents (a). The law is the same, where a wife, having power to dispose of property by her Will, makes her Will and afterwards destroys it by the compulsion of her husband (b). So where after the death of the testator, his Will and codicil were wrongfully torn by his eldest son; the Court, by means of some pieces which were saved, and by oral evidence, having arrived at the substance of the instrument, pronounced for them (c). So in *Podmore v. Whatton* (d), where there was satisfactory evidence that the defendant (the brother of the deceased, who had taken out letters of administration) had possessed himself of the Will after the death of the testator, and had suppressed or destroyed it; Sir J. P. Wilde granted letters of administration with the draft of the Will annexed to the residuary legatee. It should be observed that the same judge, in *Wharram v. Wharram* (e), appeared to doubt, but it was submitted in former Editions of this Work without sufficient reason, whether the Courts have been justified in allowing a Will to be proved by parol evidence only, where it has to be shown to be lost or destroyed, and to doubt the soundness of the doctrine laid down by the Court of Queen's Bench in *Brown v. Brown* (f), that parol evidence of the contents of a lost instrument may be received as much when it is a Will as any other. And this submission of Sir Edward Vaughan Williams has been amply justified by the case of *Sugden v. Lord St. Leonards* (g). Declarations made by a testator after the date of an alleged Will are not admissible to prove the execution of the Will (h). If a Will be wholly or partially mutilated or destroyed by the testator whilst of unsound mind, it will be pronounced for as it existed in its integral state, that being ascertainable (i).

So a Will
mutilated by
testator whilst
non compos,
may be estab-
lished.

(a) *Trevelyan v. Trevelyan*, 1 Phillim. 149; *Sugden v. Lord St. Leonards*, 1 P. D. 154; *Sly v. Sly*, P. D. 91. See *post*, Pt. I. Bk. IV. Ch. II. § v.

(b) *Williams v. Baker*, Prerog. June 1, 1839.

(c) *Foster v. Foster*, 1 Add. 462; *In the goods of Leigh*, [1892] P. 82.

(d) 3 Sw. & Tr. 449.

(e) 3 Sw. & Tr. 301.

(f) 8 E. & B. 876; approved in *Sugden v. Lord St. Leonards*, 1 P. D. 154; *conf. Woodward v. Gouldstone*, 11 App. Cas. 469.

(g) 1 P. D. 154. See further on this subject, *post*, Pt. I. Bk. IV. Ch. II. § v.

(h) *Atkinson v. Morris*, [1897] P. 40. And see *Eyre v. Eyre*, [1903] P. at p. 137. And cf. as to declarations with regard to alterations in a Will, *ante*, p. 96.

(i) *Scruby v. Fordham*, 1 Add. 74; *In the goods of Brand*, 3 Hagg.

It must be borne in mind that the *onus* of making out that the cancellation of a Will was the act of the testator himself, lies upon those who oppose the Will. Accordingly where a holograph instrument, purporting to be a codicil, was sent anonymously by the post to one of the legatees named therein, it was admitted to probate, though partially burnt and torn across, the handwriting being satisfactorily proved and the confirmatory and adminicular proof being sufficient to satisfy the Court that it was a genuine instrument (*k*).

The *onus* of showing a cancellation to be the act of the testator lies on those who oppose the Will.

SECTION II.

Revocation by a subsequent Testamentary Disposition.

“Concerning the making of a latter testament,” says Swinburne (*l*), “so large and ample is the liberty of making testaments, that a man may, as oft as he will, make a new testament even until his last breath; neither is there any cautel under the sun to prevent this liberty: But no man can die with two testaments, and therefore the last and newest is of force; so that if there were a thousand testaments, the last of all is the best of all, and maketh void the former.”

It is indeed a necessary consequence of the ambulatory nature of a Will, that the *last* testamentary disposition of property by a testator shall be operative, to the exclusion of any previous contrary or inconsistent one. And this even though the earlier Will is contrary to or inconsistent with a later non-appearing Will, the existence and contents of which are proved by parol evidence. Accordingly in *Helyar v. Helyar* (*m*), Sir G. Lee held that the execution of a second Will, with a different executor and residuary legatee, was by law a revocation of the first, though the second did not then appear (*n*). So in *Brown v. Brown* (*o*), a testator, after the Wills Act, executed a Will, and afterwards a second one, which he took away with him. After his death the earlier Will was found, but the second could not be found. Secondary evidence was given which

Last Will operative to the exclusion of prior contrary or inconsistent Will.

Prior Will revoked by subsequent non-appearing Will.

754; *In the goods of Shaw*, 1 Curt. 805; or during drunkenness: *In the goods of Brassington*, [1902] P. 1.

(*k*) *Hitchins v. Wood*, 2 Moo. P. C. C. 355—447.

(*l*) Pt. 7, s. 14, pl. 1.

(*m*) 1 Cas. temp. Lee, 472.

(*n*) See *post*, p. 127, as to whether the first Will would be revived by the revocation of the second.

(*o*) 8 E. & B. 876.

showed that the second Will was inconsistent with the first and revoked it. It was held that the second Will must be presumed to have been destroyed by the testator *animo revocandi* (p), and that consequently, the first Will having been revoked by it, the deceased died intestate. But where the revocation of an existing Will is sought to be established by the proof of the execution of a subsequent Will, not appearing, the evidence ought to be most clear and satisfactory, and if parol evidence alone be relied on, such evidence ought to be stringent and conclusive (q).

Evidence must be most clear and satisfactory.

A prior testamentary paper not revoked by a subsequent one, unless they be inconsistent :

But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together: for though it be a maxim, as Swinburne says above, that "no man can die with two testaments," yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last Will of the deceased (r). And if a subsequent testamentary paper, whether in form a Will or a codicil, be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent (s).

(p) See *ante*, p. 112.

(q) *Cutto v. Gilbert*, 9 Moo. P. C. 131, 140, 141. See also *Hellier v. Hellier*, 9 P. D. 237.

(r) See a strong instance of this in *Masterman v. Maberly*, 2 Hagg. 235; *Sandford v. Vaughan*, 1 Phil. 39, 128; *Harley v. Bagshaw*, 2 Phil. 48; *In the goods of Graham*, 3 Sw. & Tr. 69; *Geaves v. Price*, *ib.* 71; *In the goods of Budd*, *ib.* 196; *Birks v. Birks*, 4 Sw. & Tr. 23, in which last case, by a blunder, clauses had been omitted in a subsequent copy made of a Will, and the copy and the original Will, having both been duly executed, were admitted to probate as together containing the Will: *In the goods of Fenwick*, L. R. 1 P. & D. 319. See also *In the goods of Nickalls*, 4 Sw. & Tr. 40; *In the goods of Harris*, L. R. 2 P. & D. 83; *In the goods of Donaldson*, L. R. 3 P. & D. 45, in which cases one of the papers related to property abroad: *Douglas-Menzies v. Umphelby*, [1905] A. C. 224.

(s) The above passage has been judicially approved: *In the goods of Petchell*, L. R. 3 P. & D. 153, 156; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Stoddart v. Grant*, 1 Macq. H. L. 163; *Cadell v. Willcocks*, [1898] P. 21, 25; *Townsend v. Moore*, [1905] P. 66; *Simpson v. Foxon*, [1907] P. 54. And see judgment of Davey, L. J., in *Re Elcom*, [1894] 1 Ch. at p. 314. See also *Hellier v. Hellier*, 9 P. D. 237; *Robinson v. Clarke*, 2 P. D. 269. But even if the earlier Will disposes of the whole of the testator's property, and the later Will does not contain a revocation clause nor a residuary gift, it may appear from a comparison of the two documents that the later was intended to revoke the earlier: *In the estate of Bryan*, [1907] P. 125.

Where, however, a testator by a paper purporting to be "his last Will," and in which executors were appointed, disposed of a *part* only of his personal estate, and did not expressly revoke a former testamentary paper, it was held by Sir Herbert Jenner Fust, in *Plenty v. West* (t), that the earlier paper was nevertheless revoked by the later, notwithstanding the two were not wholly inconsistent; there being nothing to show that he intended them to be taken conjointly as his Will: And it was said by the judge that he knew of no case where the testator called a Will "his last Will" in which the Court has held former papers to be included. But, as was pointed out by the Judicial Committee of the Privy Council in *Cutto v. Gilbert* (u), the fact that the testator called the second paper his "last Will" was only one circumstance with others on which Sir H. Jenner Fust founded his decision, and not the sole ground of it, as Sir John Dodson in his judgment in *Cutto v. Gilbert*, in the Court below, seems to have thought; and it is now settled law that the mere use of the words "last Will" or "last and only Will" does not necessarily import a revocation of all previous instruments (x).

or unless the latter be a substantive Will *sed quære* :

In *Plenty v. West* the judge further remarked that the appointment of executors has always been considered to effect a complete disposition. But this, as it has been since held by Sir John Dodson, is by no means conclusive of the testator's intention to constitute a substantive Will (y). Con-

effect of appointment of executors.

(t) 1 Robert. 264; *S. C.*, 4 Notes of Cas. 103; *S. C.*, *coram* M. R., 16 Beav. 173. But instances may be found where a paper calling itself a last Will and testament has been admitted to probate as an addition to a former Will: *In the goods of Luffman*, 5 Notes of Cas. 183; *In the goods of Langhorn*, *ib.* 512. And see further *In the goods of Holt*, 6 Notes of Cas. 93, 96; 2 East, 494, 595, by Lord Ellenborough and Lawrence, J.

(u) 9 Moo. P. C. 131, *post*, p. 119.

(x) *Freeman v. Freeman*, 5 De G. M. & G. 704, *post*, p. 120; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Simpson v. Foxon*, [1907] P. 54; see *post*, p. 121. And see *In the goods of De la Saussaye*, 3 P. & D. 42, 44; *In the goods of Petchell*, 3 P. & D. 153; *Dempsey v. Lawson*, 2 P. D. 98; *In the goods of O'Connor*, 13 L. R. Ir. 406.

(y) *Richards v. Queen's Proctor*, 18 Jur. 540; *Stoddart v. Grant*, 1 Macq. H. & L. 163, 173. And where a second Will appoints a fresh executor, if the Wills are not inconsistent, probate may be granted to both the executors: *In the goods of Leese*, 2 Sw. & Tr. 442; *In the goods of Graham*, 3 Sw. & Tr. 69; *Geaves v. Price*, 3 Sw. & Tr. 71; *In the goods of Morgan*, L. R. 1 P. & D. 323. A testator executed a Will purporting to dispose of, and in fact only disposing of property in Tasmania, and appointed thereby executors resident in Tasmania. He subsequently executed another Will, disposing of his property in England, and thereby ratified and confirmed his Will

A paper disposing of all the estate, without making an executor, wholly revokes a prior Will, though appointing executors.

Effect of express revocatory clause in subsequent Will.

Mere fact of a later Will existing will not operate a revocation, at least in the Common Law Courts :

versely, where by a testamentary paper, which was executed as a Will and not as a codicil, all the testator's property is given to a particular person, without the appointment of any executor, such paper will operate as a total revocation of a prior Will, even though an executor may have been appointed by such prior Will. For the later paper being, in fact, a Will, disposing of all the property, although there is no express revocation of the former Will or of the appointment of an executor, is *ex necessitate* a revocation of the former (z).

It may here be observed, that a Will of a date prior to a Will with a revocatory clause may be admitted to probate, if there is any part of it which the Court is satisfied that it was not the intention of the testator to revoke (a).

Upon the same principles it has been decided, in the Courts of Common Law, that a subsequent Will is no revocation, unless the contents of it are known: and it is not to be presumed, from the mere circumstance of another Will having been made, that it revoked the former. As where it was found by a special verdict that the testator after the making of a former Will made another Will in writing, but what the contents and purport were the jury did not know: the second Will was holden not to be a

relating to the property in Tasmania. In this last Will he appointed three executors distinct from those named in the earlier Will, and the Court ordered probate to issue of both papers as together containing the Will of the testator: *In the goods of Harris*, L. R. 2 P. & D. 83. Where a second Will appoints no fresh executor, probate of both Wills may be granted to the executor named in the first Will: *In the goods of Griffith*, L. R. 2 P. & D. 457.

(z) *Henfrey v. Henfrey*, 2 Curt. 468; affirmed in the Privy Council, 4 Moo. P. C. C. 29. Where a testator made two Wills, the first in England according to English law, by which he disposed of all his realty and personalty, and appointed an executor; the second in Italy according to Italian law, by which he appointed his wife "universal heiress"; and this Will contained a revocatory clause in the following terms: "I erase, revoke, and annul every other act or last Will which I may have made"; the Court held that the Italian Will revoked the disposition of personalty and the appointment of executor contained in the English Will, and that the Italian Will alone was entitled to probate: *Cottrell v. Cottrell*, L. R. 2 P. & D. 397.

(a) A codicil which absolutely revokes and makes void all bequests and dispositions in a Will and nominates executors, but does not in direct terms revoke the appointment of executors and guardians in the Will, does not revoke the Will; for the legal operation of a codicil is to confirm such parts of the Will to which it refers, as it does not revoke: *In the goods of Howard*, L. R. 1 P. & D. 636; *Re Wilcock*, [1898] 1 Ch. 95. See to the same effect, *Denny v. Barton*, 2 Phil. 575, and *Gladstone v. Tempest*, 2 Curt. 650, decided before the Wills Act. But see *Collins v. Elstone*, [1893] P. 1.

revocation of the first: for the other Will might concern other lands, or no lands at all, or be a confirmation of the former (b).

And although a Will be expressly found to be different from a former, yet if it be declared that it is not known in what that difference consisted, it will be no revocation in law thereof. Thus where it was found by a special verdict (c) that the testator did make and duly publish *another* Will in writing in the presence of three subscribing witnesses who duly attested the same; that the disposition made by the testator by the second Will *was different* from the disposition in the former Will, but in what particular was unknown to the jury; but they did not find that the testator cancelled the second Will, or that the devisee under the first Will destroyed the same, but what was become of the second Will the jury could not tell: it was adjudged in the King's Bench, on error, reversing the judgment of C. B. to the contrary, that the second Will was no revocation of the first; and the judgment of the Court of King's Bench was affirmed in the House of Lords (d).

though it be expressly found to be different from a former Will, if the particulars be unknown :

In *Cutto v. Gilbert* (e), Sir John Dodson, in the Ecclesiastical Court, declined to recognize these doctrines of the Common Law: In that case a testator, having duly executed his Will, subsequently executed another testamentary paper, which was not found at his death, and the contents of which were unknown, save that it was headed "last Will"; and that learned judge held that the former Will was revoked by the execution of the latter, being of opinion that the execution of a Will of personalty amounts to a revocation of a former Will, whether the contents of the later Will are known or not, provided there be, in substance and effect, revocatory words. But *this decision was reversed in the Privy Council*; their lordships being of opinion that the words, "this is my last Will," did not import that the paper contained a different disposition of the property; and that

a later Will, of which nothing is known but that it was headed "last Will," is no revocation.

(b) *Hitchins v. Bassett*, 3 Mod. 203, affirmed in the House of Lords, Show. Cas. Parl. 146. "Hence it seems to follow," says Mr. Serj. Williams, in his note to *Duppa v. Mayo*, 1 Saund. 279 h, "that what Lord Hale is said to have laid down in a former case upon the same Will (*Seymour v. Nosworthy*, Hard. 376), namely, that 'a second substantive independent Will, though it does not by express words import a revocation of a former Will, or pass any land, amounts in law to a revocation,' is either not correctly reported, or if it be, is overruled by *Hitchins v. Bassett*."

(c) *Goodright v. Harwood*, 3 Wils. 497, affirmed in the House of Lords, 7 Bro. P. C. 344; 1 Saund. 279 h.

(d) See also *Dickinson v. Stidolph*, 11 C. B. N. S. 357.

(e) 18 Jur. 560.

the mere fact of so calling it did not render it a revocatory instrument (f). Again, in *Freeman v. Freeman* (g), Lord Justice Knight Bruce said, that whatever might be the view of the Ecclesiastical Courts, he did not think a temporal Court bound to say that when a man in an instrument, containing temporary dispositions by him, describes it as his last Will and Testament, and otherwise calls it his Will, he is to be taken *primâ facie* as meaning wholly to annul any former testamentary instrument made by him extending to matters to which the latter does not extend. And accordingly the Lord Justices held that the expression, "this is my last Will and Testament," does not operate as a revocation of a former Will, without words to that effect, at all events as regards real estate.

General rule
deducible
from cases.

In the case of *Dempsey v. Lawson* (h), Sir James Hannen, in reviewing the cases of *Plenty v. West*, *Cutto v. Gilbert*, and the other cases since decided, in his judgment said, "It becomes necessary to consider minutely the nature and extent of the inconsistency of a later testamentary instrument which will have the effect of revoking an earlier Will. In this investigation the Court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used, but in seeking the true meaning of the testator the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later Will does not completely cover the whole subject matter of the earlier. This is what was decided in *Plenty v. West*. There the Court held upon all the facts before it that it was the intention of the testator that the later paper should stand alone, although that disposed of a part only of his personal estate, and therefore that in effect, though not in terms, it revoked the earlier Will. . . . The case of *Cutto v. Gilbert* (i) merely decides that the bare fact of a testator having executed an instrument as his

(f) 9 Moo. P. C. 131.

(g) 5 De G. M. & G. 704.

(h) 2 P. D. 98; *In the estate of Bryan*, *infra*.

(i) 9 Moo. P. C. 131.

last Will and Testament the contents of which are unknown, does not operate as a revocation of a previous Will, and this seems very obvious, for the missing instrument may have been confirmatory of the first. It certainly does not appear from the judgment in that case that there was any intention to overrule the decision in *Plenty v. West*. . . . The Judicial Committee appear to have approved of the decision in *Plenty v. West*, upon the ground that the fact that the whole of the personal estate was not disposed of by the second Will was not by itself a sufficient reason for uniting the earlier with the later Will and admitting both to probate, the Wills being in other respects essentially different. And Lord Penzance, in *Lemage v. Goodban* (k), does not say that *Plenty v. West* is overruled, but with his accustomed accuracy only says, 'the case of *Plenty v. West*, so far as it supports the doctrine that the use of the words "last Will" in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto v. Gilbert*.' Lord Penzance further says, 'the intention of the testator in the matter is the sole guide and control.' But the intention to be sought and discovered relates to the disposition of the testator's property and not to the form of his Will. What dispositions did he intend? not which or what number of papers did he desire or expect to be admitted to probate? is the true question. I followed that decision in the case of *In the goods of Petchell*" (l).

Where upon the face of a testamentary document and the facts known to the testator at the time of its execution, it is doubtful whether the testator intended altogether to revoke a former Will, the Court will admit parol evidence to ascertain the intention (m).

If two inconsistent Wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the deceased must be considered intestate. But in every case the Courts will struggle to reconcile them, if possible, and collect some consistent disposition from the whole (n). If there

Two inconsistent Wills of the same date, or without any date.

(k) L. R. 1 P. & D. 57.

(l) L. R. 3 P. & D. 153.

(m) *Jenner v. Finch*, 5 P. D. 106; *In the estate of Bryan*, [1907] P. 125.

(n) Swinb. Pt. 7, s. 11, pl. 1; Godolph. Pt. 1, c. 19, s. 3; *Phipps v. Earl of Anglesea*, 7 Bro. P. C. 443; Toml. Ed.; *Townsend v. Moore*, [1905] P. 66.

Clause in a Will controlled by subsequent inconsistent clause.

is an express contradiction between two clauses in a Will, it is settled law that the second part of the Will must take effect over the first part (o): but it was held by Lord Romilly, M.R., in *Kerr v. Clinton* (p), that a bequest by implication is not sufficient to revoke a bequest not made by implication at all, but in express and distinct words. The Court endeavours to reconcile two apparently inconsistent dispositions without resorting to the extreme rule that where there are two inconsistent clauses the latter shall prevail (q). Moreover, a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention (r).

Revocation of a prior disposition, by a substituted one in a later instrument.

It may sometimes become a question, in a case where there are several codicils, or other testamentary papers, of different dates, whether the dispositions of the latter are to be considered as additional and cumulative to those of the prior, or as a substitute for, and consequently revocatory of them. And if a testator, by a codicil to his Will, should direct a certain mode of making a provision for his wife, and by another subsequent codicil should also direct a provision for her in another mode; on the face of these instruments it might be doubtful, whether by the latter codicil he intended to increase the provision made by the former, or to revoke it by substituting that contained in the latter. In such cases, the Court will admit parol evidence, in order to investigate the *animus* with which the act was done; and if upon such evidence it should appear, that the latter codicil, although containing no revocatory words, was intended by the testator as a substitute for the former, it shall be thereby revoked, though it remain uncanceled (s). However, the general principle is, that bequests are, *primâ facie*, to be taken cumulatively, when they are on separate papers, unless they are revocatory of each other (t). And in a case (u) in the Prerogative Court, it was said by Sir Herbert Jenner Fust, that,

Parol evidence admissible to investigate animus of act.

(o) See *post*, Pt. III. Bk. III. Ch. II. § I., 4.

(p) L. R. 8 Eq. 462.

(q) See *per* Jessel, M. R., in *Bywater v. Clarke*, 18 C. D. at p. 19.

(r) See *post*, p. 129.

(s) *Methuen v. Methuen*, 2 Phillim. 416; *Greenough v. Martin*, 2 Add. 239; *Jenner v. Finch*, 5 P. D. 106; *Wainewright v. Wainewright*, 71 L. T. 265; *Chichester v. Quatrefages*, [1895] P. 186. See *post*, Pt. III. Bk. III. Ch. II. § VII. And as to the admissibility of parol evidence, see *post*, Pt. I. Bk. IV. Ch. II. § V.

(t) *Bartholomew v. Henley*, 3 Phillim. 316, by Sir John Nicholl. See *infra*, Pt. III. Bk. III. Ch. II. § VII., as to cumulative legacies.

(u) *Thorne v. Rooke*, 2 Curt. 799.

whether the case is to be governed by the old law, or by the Wills Act, parol evidence is not to be admitted, unless there is such doubt and ambiguity *on the face of the papers* as to require the aid of extrinsic evidence to explain them (x).

If a man executes a Will, erroneously supposing it to be a copy of his former Will, it will be no revocation as to the parts omitted in the supposed copy, and both instruments will be admitted to probate (y).

A second Will executed under an erroneous supposition that it was a copy of the former Will is no revocation.

As to the revocation of a finished Will by a subsequent unfinished one (if made before Jan. 1, 1838), see the earlier Editions of this Work, Pt. I. Bk. II. Ch. 3, § 2.

It has already appeared that a cancellation of a Will, under an erroneous assumption of facts, may not operate as a revocation (z). Upon the same principle, if a man, by a subsequent Will or codicil, make a disposition different from a former one, under a false impression, the *impulse of which is the foundation of his wish to change his former intent*, such an act will be considered only as effecting a contingent presumptive revocation, depending on the existence or non-existence of that fact. As if one having previously devised to A., afterwards by another Will, without destroying the first, or by codicil, devise to B., stating her to be his wife, so that it may be understood that he intended her to be benefited in that character only, and it turn out that she was married before, and had a husband living, neither of which facts was in the devisor's knowledge (a), such devise or codicil will not operate as a revocation of the former Will, because it depends on a contingency which fails (b). It has been said, that care must

A subsequent Will or codicil, made under a mistaken notion of facts, will not revoke a former one.

(x) As to what is to be regarded as such an ambiguity, see *post*, Pt. I. Bk. IV. Ch. II. § v.

(y) *Birks v. Birks*, 34 L. J. P. M. & A. 90.

(z) *Ante*, pp. 108, 109.

(a) An appointment by a Will to a husband, under circumstances of this nature, occurred in *Kennell v. Abbott*, 4 Ves. 802.

(b) So where a testator, by Will dated in 1849, bequeathed the interest of a fund to Charlotte Lee, "but in case the said Charlotte Lee should marry or die unmarried," the fund was to go over. Charlotte Lee was the maiden name of the testator's daughter, who had been married in 1828, and it was found that the testator knew of her marriage, but that it could not be shown under what circumstances he knew it. It also appeared that Charlotte's husband had, in 1849, not been heard of for many years. After the testator's death the husband appeared, and on the death of Charlotte claimed the fund. It was

be taken to distinguish between cases, where the testator acts under a false impression, originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised on him (*c*). But there seem to be no grounds for any such distinction. Thus, where a testator gave legacies to the grandchildren of his sister, and afterwards, by a codicil, revoked the legacies, giving as a reason, that the legatees were dead; upon its being proved that the fact of their death was not true, Lord Loughborough held, that the legacies were not revoked, on the ground that the cause of the revocation was false; and said, whether it was by misinformation or mistake was perfectly indifferent (*d*). So in a case in the Prerogative Court (*e*), the deceased, supposing his Will, appointing his wife sole executrix and universal legatee for life, to be lost, made, in Peru, a nuncupative Will (not in conformity with the Statute of Frauds) with a general revocation clause, and appointing two executors, and his wife universal legatee, absolutely: The executors renounced, and she took probate of that Will in Peru: The former Will being found (of which fact he was ignorant at the time of his death), probate thereof, at the wife's prayer, was granted to her: and Sir John Nicholl observed that it was unnecessary to decide the question (about which there might be some doubt), whether the Statute of Frauds would apply to the nuncupative Will made in Peru; because it appeared that the deceased did not intend to revoke the former Will; but, supposing it to be lost and being unwilling to die intestate, he made the nuncupative Will. Accordingly, in *Doe v. Evans* (*f*), where a testatrix by her Will devised all her estate to L. E. for life, and to his sons and daughters successively, in strict tail, and L. E. and his only son died in the lifetime of the testatrix, but he left a daughter E. E., of whose birth she knew nothing, and she thereupon made a codicil, in which she recited her former Will, and that L. E. had died without leaving any issue, and then devised over: It was held, that, as this codicil was made in

held by Page Wood, V.-C., that the circumstances were sufficient to show that the testator, in 1849, believed his daughter's husband to be dead, and that he intended that no husband of hers should have the benefit of the fund; and, accordingly, that on her death it passed by the gift over: *Crosthwaite v. Dean*, L. R. 5 Eq. 245.

(*c*) 1 Powell on Dev. 525.

(*d*) *Campbell v. French*, 3 Ves. 322.

(*e*) *In the goods of Moresby*, 1 Hagg. 378.

(*f*) 10 A. & E. 288.

ignorance of the existence of E. E., it was only a conditional revocation (*g*). But where a testator gave all his coins to a university, and afterwards by codicil revoked the gift, and declared that he had handed over to the university all the coins, and subsequently he delivered to the university the greater part of the coins, on the death of the testator the university claimed the remainder of the coins on the ground that the revocation was based on an erroneous assumption, and therefore conditional: but the Court held that the revocation was absolute (*h*).

But there does seem to be a distinction between cases, where the testator refers to a fact as having actually happened, and where he merely expresses his doubt, supposition or advice of the fact. Thus in the case of the *Attorney-General v. Lloyd* (*i*), the testator, by his Will, dated 8th February, 1734, gave particular lands and his personal estate, to be laid out in lands, to charitable uses. He afterwards made a codicil, dated 12th July, 1736, in which, after reciting his doubt whether such devise would be good, he gave the lands to M. B. and his heirs, if by the Mortmain Act they could not pass according to his Will. On 17th March, 1737, he made another codicil, the terms of which were, that the testator, "being advised" that the devise of his lands was void, and it being his intention that the charity should be continued, and being advised that his personal estate could be given, he did, by that codicil, give his personal estate to the charitable uses, and his real estate to M. B. The former part of this advice seems to have been ill-founded; for in *Ashburnham v. Bradshaw* (*k*), it had been certified by the opinion of all the judges, to Lord Hardwicke, that a devise of lands

Distinction between cases where testator refers to a fact as having actually happened, and where he merely expresses doubt, supposition, or advice of the fact.

(*g*) Some time after making the codicil, the testatrix was made acquainted with the existence of E. E., but made no further testamentary disposition: It was held, that this did not set up the codicil: for, having been once inoperative, it could only be republished according to the Statute of Frauds. In *Parker v. Nickson*, 1 De G. J. & S. 117, the words in a Will, "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property, situate in the parish of M.," were held by Lord Westbury to be an effectual gift to N., who was, in fact, neither heir nor next of kin of the testator. The Will concluded, "N., my second cousin, is my next of kin and heir-at-law, as my brother John is dead and has left no issue." The testator had another brother, named William, and his Lordship held, that these words must not be taken as proving that the testator was under the erroneous belief that his brother William was dead without issue.

(*h*) *Re Churchill*, [1917] 1 Ch. 206.

(*i*) 3 Atk. 515, disapproved of by Malins, V.-C., in *Thomas v. Howell*, L. R. 18 Eq. 198, 211.

(*k*) 2 Atk. 36.

under a Will to charitable uses, made before the Statute of Mortmain (which was enacted in 1736), notwithstanding the testator survived the enactment, passed the land. But Lord Hardwicke observed, that the testator had put the devise on the fact of his being advised; and that he was so advised was a fact in his own knowledge; and he had grounded his devise upon this advice, and not upon the reality of the law, though that should come out in the event one way or another; upon that he made his determination, which he might do to quiet a doubtful question,—“I will not have this litigated after my death, but I will settle it myself, upon some certain foundation” (l). His Lordship afterwards ordered a case to be stated for the opinion of the judges of the King’s Bench, and they certified that the real estate was well devised to M. B., under the second codicil. So in the *Attorney-General v. Ward* (m), the testatrix, having, by her Will, given 300*l.*, to be divided among such of the children of E. D. as should be living, by a codicil gave to her brother’s son “the 300*l.* designed for E. D.’s children, as I know not whether any of them are alive, and if they are well provided for:” Lord Alvanley held that this operated as a complete revocation of the legacy, though the children of E. D. were alive and claimed the legacy: The learned judge observed, that it had been argued, and with some ground, that if it had rested upon her not knowing whether they were living, there would be good reason to contend, that it fell within the case of “*Pater credens filium suum esse mortuum, alterum instituit heredem: filio domum redeunte, hujus institutionis vis est nulla*” (n); but she went further, that she doubted if they were living, whether they might not be well provided for; and the Court would not inquire whether they were well provided for or not.

Will executing a

From the cases referred to in the note below (o), Sir C. Cresswell in the case of *In the goods of Merritt* (p), appears to

(l) His Lordship afterwards said, his principal doubt in this case was, whether the new disposition by the second codicil was put singly upon the point of law; the testator might have been advised that his personal estate had so much increased since making the Will as to be sufficient to support the charity.

(m) 3 Ves. 327.

(n) Cicero de Oratore, lib. 1, c. 38.

(o) *Richardson v. Barry*, 3 Hagg. 249; *Hughes v. Turner*, 4 Hagg. 52; *Brenchley v. Lynn*, 2 Robert. 441; *In the goods of Holt*, 6 Notes of Cas. 93.

(p) 1 Sw. & Tr. 112, 116, 117. See also *In the goods of Meredith*,

have deduced the rule, and acted upon it, that a general clause revoking all former Wills was not sufficient to manifest an intention to revoke a Will made in execution of a power, but this rule has been disapproved of and cannot now be considered the law, and the later decisions have established that a Will containing a clause revoking all former Wills will revoke an appointment made by an earlier Will, whether the power be special or general, unless it appears utterly unreasonable that it should have that effect (q). It has been held that an appointment by Will under a general power was revoked and the power executed by a later Will containing a residuary bequest and not referring to the testamentary appointment (r). In the case of *Cadell v. Wilcocks* (s), however, it was held that the execution of a limited power of appointment contained in an earlier Will was not revoked by general words of bequest contained in a later Will.

power when
revoked by
subsequent
Will.

It was long a *vexata quæstio*, whether the principle of law was, that, on the revocation of a later Will, a former uncanceled Will should revive, or not. In the Common Law Courts, it was certainly laid down as an absolute proposition, excluding all questions of intention, that the former Will should revive (t).

Question
prior to Wills
Act whether
on the revo-
cation of a
later Will
a former
uncancelled
Will revived?

In the Ecclesiastical Courts, it seems that a different doctrine from that laid down in the Common Law Courts prevailed; for it had been decided in a variety of cases, that the presumption was *against* the revival of the prior Will, and that the *onus* was thrown on the party setting it up, to rebut that presumption (u).

Now, however, with respect to Wills which are within the operation of the stat. 1 Vict. c. 26, it is enacted by s. 22 of that Act, that "no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the Act, and showing an intention to revive the same," and the destruction of a second Will, itself revoking one of prior

1 Vict. c. 26,
s. 22.

29 L. J. P. M. & A. 155; *In the goods of Joys*, 30 L. J. P. M. & A. 160.

(q) *Sotheran v. Dening*, 20 C. D. 99. See also *In the goods of Eustace*, L. R. 3 P. & D. 183; *Re Kingdon*, 32 C. D. 604; *In the goods of Tenney*, 45 L. T. R. 78.

(r) *Re Gibbe's Settlement*, 37 C. D. 143.

(s) [1898] P. 21.

(t) *Harwood v. Goodright*, 1 Cowp. 91.

(u) See the different cases cited in *Moore v. Moore*, 1 Phillim. 412.

date (*x*), cannot re-instate the first Will, even though it may be in existence at the time of the testator's death (*y*).

A codicil referring to a Will destroyed by testator does not revoke a later Will.

It may here be mentioned, that it has been held, that a codicil which shows an ineffectual intention to revive an earlier Will, which was destroyed, does not thereby revoke a Will made subsequently to the destroyed Will if it is not inconsistent therewith and does not show any intention to revoke it (*z*).

SECTION III.

By express Revocation.

Revocations after Jan. 1, 1838: 1 Vict. c. 26, s. 20.

According to the Statute of Wills (1 Vict. c. 26, s. 20), an express revocation of a Will or other testamentary instrument cannot be effectual, unless it be contained in a Will or codicil executed as required by the Act, or in "some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed."

By sect. 34, it is enacted, that "this Act shall not extend to any Will made before January 1, 1838." The construction of which clause has been understood to be, with reference to the subject of the present inquiry, that the statute shall not extend to any act of revocation done with respect to a Will before January 1, 1838 (*a*).

Declaration of intention to revoke within sect. 20 of Wills Act.

Where a testatrix devised real estates, and by a subsequent void deed, attested by two witnesses, conveyed them to other trusts; it was held by Romilly, M. R., that the deed was not a writing declaring an "intention to revoke" within the 20th section of the Statute of Wills. Such a declaration need not be in terms, *i.e.*, "I do declare that I intend to revoke my Will," but must be in equivalent terms amounting to that (*b*).

(*x*) A subsequent Will may revoke a prior disposition, not only if it contains a revocatory clause but also if it is inconsistent with it, *e.g.*, if the second Will disposes of the whole estate: *Henfrey v. Henfrey*, 4 Moo. P. C. 29; *Lemage v. Goodban*, L. R. 1 P. & D. 57. See *ante*, p. 122 *et seq.*

(*y*) *Brown v. Brown*, 8 E. & B. 876. See also *In the goods of Brown*, 1 Sw. & Tr. 32; *Dickinson v. Swatman*, 30 L. J. P. & M. 84; *Sotheran v. Dening*, 20 C. D. 99.

(*z*) *Rogers v. Goodenough*, 2 Sw. & Tr. 342. See *post*, Pt. I. Bk. II. Ch. IV. § II.

(*a*) *Hobbs v. Knight*, *ante*, p. 96. As to the express revocation of Wills prior to the above date, see the earlier Editions of this Work, Pt. I. Bk. II. Ch. III. § III.

(*b*) *Ford v. De Pontes*, 30 Beav. 572. Where the testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words signed by

In the case of *Doe v. Hicks* (c), it was stated by Tindal, C. J., in delivering the opinion of the judges in the House of Lords, that the principle is, that where a devise in a Will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise (d). The law thus laid down has been recognized and acted upon as an established rule in numerous subsequent cases (e).

Indeed, it may be stated generally as a canon of construction, that a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention (f). But in applying this rule it is sufficient that the subsequent words indicate the testator's intention to cut the gift down with reasonable certainty, and the rule does not mean that you are to institute a comparison between the two clauses as to lucidity (g).

It may be deduced from the case of *Onions v. Tyrer* (h), and the authorities which have been cited in a previous section (with respect to the doctrine of cancellation, dependent on the efficacy of another act), that even an express revocation of all former Wills, though not wanting in any circumstance for a revocation, will not operate as such, if only subservient to another subsequent disposition, which fails (i).

To revoke a clear devise, the intention to revoke must be as clear as the devise.

Rule that a clear gift cannot be cut down by subsequent words unless they show equally clear intention.

Application of rule.

Express revocation subservient to another disposition.

himself and attested by two witnesses "we are witnesses of the erasure of the above," it was held that the codicil was revoked, for the words above mentioned were "a writing declaring an intention to revoke" within the above section: *In the goods of Gosling*, 11 P. D. 79. Where a testator sent a letter signed by himself and attested by two witnesses, desiring the destruction of his Will, the letter was held to revoke the Will: *In the goods of Durance*, L. R. 2 P. & D. 406; *Toomer v. Sobinska*, [1907] P. 106.

(c) 8 Bing. 479.

(d) See accord. *Cleoburey v. Beckett*, 14 Beav. 587, per Romilly, M. R.; *Williams v. Evans*, 1 E. & B. 739; *Kermode v. Macdonald*, L. R. 1 Eq. 457; 3 Ch. 584; *Re Wilcock*, [1898] 1 Ch. 95.

(e) *Patch v. Graves*, 3 Drew. 348, 376; *Robertson v. Powell*, 2 Hurl. & C. 762; *Butler v. Greenwood*, 22 Beav. 303; *Norman v. Kynaston*, 29 Beav. 96; *S. C.*, 3 De G. F. & J. 29; *Molyneux v. Rowe*, 8 De G. M. & G. 368.

(f) *Kiver v. Oldfield*, 4 De G. & J. 30; *Hearle v. Hicks*, 1 Cl. & F. 20, 24; *Re Freeman*, [1910] 1 Ch. 681.

(g) *Randfield v. Randfield*, 8 H. of L. 225, 235, 238. As to the latter clause prevailing when two clauses are irreconcilable, see *ante*, p. 122, and *post*, Pt. III. Bk. III. Ch. II. § I., 4.

(h) 2 Vern. 742. And see *ante*, p. 107.

(i) By Sir W. Grant, 7 Ves. 379; unless it fails by reason of the incapacity of the legatee: *Tupper v. Tupper*, 1 K. & J. 665, *ante*, p. 109; *Quin v. Butler*, L. R. 6 Eq. 225; *Re Bernard*, [1916] 1 Ch. 552.

Effect of a general revocatory clause in a Will.

Generally speaking, where a Will contains a general revocatory clause, it operates as a revocation of all prior testamentary acts. But there has already been occasion to point out that probate may be granted of a paper of a date prior to such a Will, provided the Court is satisfied that it was not the intention of the deceased to revoke the particular legacy which is the subject of the earlier paper (*k*).

A codicil intending to revive a destroyed Will no revocation of an intermediate Will.

A codicil, which ineffectually intends to revive a prior Will which the testator has destroyed, does not operate as a revocation of an intermediate Will, if it is not inconsistent therewith, and does not show any intention to revoke (*l*).

SECTION IV.

Revocation by the Republication of a Prior Will.

If a man make a Will, and at a future period republish it, such republication will revoke any Will intermediate to the original date of the prior Will and the date of its republication (*m*). But this subject will be more conveniently discussed hereafter, when the doctrine of republication, generally, is considered (*n*).

SECTION V.

Revocation by Marriage or other change of circumstances, and therewith of Contingent Wills and Presumptive or Implied Revocation.

Presumed and implied revocation.

The different methods of *expressly* revoking a Will having been now considered, it remains to treat of presumed or implied revocation.

1 Vict. c. 26, s. 19: no Will after Jan. 1, 1838, to be revoked by presumption.

It is enacted by the Wills Act (1 Vict. c. 26, s. 19), that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

The general rule has been, from the earliest periods of the Ecclesiastical law, in accordance with this enactment, that a Will once executed remains in force, unless revoked by some act done by the testator, *animo revocandi*: such as burning, cancelling, making a new Will, or the like.

(*k*) *Ante*, p. 118.

(*l*) *Rogers v. Goodenough*, 2 Sw. & Tr. 342; *In the goods of Law*, 21 L. T. 399.

(*m*) *Rogers v. Pittis*, 1 Add. 38; *Jansen v. Jansen*, *ib.* 39; *Walpole v. Lord Cholmondeley*, 7 T. R. 138.

(*n*) *Post*, Pt. I. Bk. II. Ch. IV. § 11.

Here it may not be improper to take notice of the case of *a contingent Will*, where, whether it will eventually take place as a Will or not, depends upon the happening or not happening of a certain event. As where a person intending to go to Ireland, made his Will in these words:—"If I die before my return from my journey to Ireland, that my house and land at F., and all the appurtenances and furniture thereto belonging, be sold as soon as possible after my death, and thereout all my debts and funeral charges be paid. Item, 1,000*l.* to A. out of the said money arising by the said sale, and 100*l.* to B.:" The testator, after making the said Will, went to Ireland, and returned to England, lived some years afterwards and died: It was held by Lord Hardwicke that the Will was contingent, depending upon the event of the testator's returning to England, or not; and that as he did return, the Will could have no effect, but was void (o). The Courts, however, are cautious how they construe conditions of this sort. Therefore, where a testator by three letters gave certain testamentary directions, "In case I should die on my travels:" it was held, that, although he returned, and lived many years afterwards, yet as, by subsequent acts, he recognized the papers two years before his death, his return was not such a defeasance as to invalidate the disposition of his property directed by them (p). In *Burton v. Collingwood* (q), a Will written eighteen years before the testator's death, containing this passage, "Lest I die before the next sun, I make this my last Will," was admitted to probate, the Court holding the disposition not contingent; and adherence to it being shown by careful preservation (r). The

Contingent
Will.

(o) *Parsons v. Lanoe*, 1 Ves. Sen. 190; 1 Saund. 279, *d.* note to *Duppa v. Mayo*.

(p) *Strauss v. Schmidt*, 3 Phillim. 209. See also *Ingram v. Strong*, 2 Phillim. 294. In *Forbes v. Gordon*, 3 Phillim. 625, Sir John Nicholl said that where a paper begins, "In case of my inability to make a regular codicil to my Will, I desire the following to be taken as a codicil thereto," the Court had in many instances decided that it means no more than, "Till I make a regular Will, so long I adhere to this paper."

(q) 4 Hagg. 176.

(r) The following are cases decided since the Wills Act in which Wills have been held to be contingent. A Will containing the words "should anything happen to me on my passage to Wales or during my stay": *Roberts v. Roberts*, 2 Sw. & Tr. 337. "Being on the eve of embarking for San Francisco, South America, or Mexico, I do hereby, in case of my decease during my absence being fully ascertained and proved, will," &c.: *In the goods of Winn*, 2 Sw. & Tr. 147. "Being obliged to leave England to join my regiment in China,

Evidence of adherence cannot establish a Will which is in terms conditional.

result of the cases appears to be that if the Will is made dependent on the contingency occurring its validity will depend on the happening of the contingent event, but that if the contemplated possible event is merely the reason of the making of the Will it will be valid and effectual in any event (s). Since the Wills Act it is clear that no evidence of adherence can establish the Will where it is in its terms conditional, as where the Will is expressed to take effect "In case of the testator's decease during his absence on a particular voyage" (t), or "should anything happen to me on my passage to Wales or during my stay" (u); for in such cases if the testator's parol declarations were admitted, it would be nothing less than

I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad I wish everything that I may be in possession of *at that time*, or anything appertaining to me hereafter to be divided": *In the goods of Porter*, L. R. 2 P. & D. 22. "In case anything should happen to me during the remainder of the voyage to Sicily and back to London": *In the goods of Robinson*, L. R. 2 P. & D. 171. A mariner's Will commencing "Instructions to be followed if I die at sea or abroad": *Lindsay v. Lindsay*, L. R. 2 P. & D. 459. A joint Will containing the words "In case we should be called out of this world at one and the same time by one and the same accident": *In the goods of Hugo*, 2 P. D. 73. The following are cases where Wills have been held *not* to be contingent:—A Will purporting to be made in the exercise of a power and on the assumption that the nominal husband of the testatrix would survive her: *Southall v. Jones*, 28 L. J. P. & M. 112; and see *Townsend v. Moore*, [1905] P. 66. A Will made in Africa and commencing "In the event of my death while serving in this horrid climate or on any accident happening to me, I leave, &c.": *In the goods of Thorne*, 4 Sw. & Tr. 36. A Will containing the words, "In the case of any fatal accident happening to me being about to travel by railway, I hereby leave, &c.": *In the goods of Dobson*, L. R. 1 P. & D. 88. This case was distinguished from the case of *In the goods of Winn*, *ubi supra*, as not being limited to a particular journey but referring to railway travelling generally. A Will in these words, "I, W. M., being physically weak in health have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *Appellina* to the floating hospital ship *Berwick Walls* in order to recruit my health, and in the event of my death occurring during such time, I do hereby will and bequeath, &c.": *In the goods of Martin*, L. R. 1 P. & D. 380. A will containing the words, "On leaving this station for Thargomindah and Melbourne in case of my death on the way know all men that this is a memorandum of my last Will and testament": *In the goods of Mayd*, 6 P. D. 17. This case is distinguished from *In the goods of Porter*, *ubi supra*, as not containing the words relied on by Lord Penzance in that case, viz., I wish everything that I may be in possession of *at that time* (i.e., at the time of his death abroad) to be divided.

(s) *In the goods of Spratt*, [1897] P. 28, 35; *Halford v. Halford*, *ib.* 36; *Edmundson v. Edmundson*, 17 T. L. R. 397; *In the estate of Vines*, [1910] P. 147.

(t) *In the goods of Winn*, 2 Sw. & Tr. 147.

(u) *Roberts v. Roberts*, 2 Sw. & Tr. 337.

making a Will by word of mouth; and the act of adherence cannot carry the case further than a parol declaration.

If at the time of the death of the testator it is uncertain whether the condition, on which the Will is to take effect, will or will not happen, probate will, it would seem, be granted at once though it will only determine what is to be done with the property in certain events (*x*). Where at death of testator the happening of the condition is uncertain.

A Will may be made contingent on the assent of a third party: and such Will will only be admitted to probate on the happening of the contingency on which it is dependent, viz., the assent of the third party (*y*).

Generally a Will made contingent on an event which has become impossible at the death of the testator will not be admitted to probate, but a contingent or conditional codicil may, it should seem, operate as a republication of a Will, or to make a Will valid if it has not been duly executed, and on that ground entitled to probate (*z*). But if a Will be conditional the condition will attach to the whole document, and therefore a revocation of a previous Will contained therein will be subject to the happening of the contingency no less than the rest of the Will (*a*). Conditional codicil when admitted to probate.

Under the old law if the testator had endorsed on his Will after its execution a memorandum that it was only to take effect on the happening of a particular contingency, such an endorsement would have been in itself testamentary, and would have expressed his intentions in a legal form, so as to have given effect to them. But since the Wills Act, such a memorandum, unless it be duly executed and attested, is wholly unavailing as part of the Will, and cannot be used as evidence of the testator's intention that the Will should be contingent only (*b*). Condition unavailing unless part of duly executed Will

Where two sisters, being then unmarried, made mutual Wills, and the Will of one of them was afterwards revoked by her marriage, it was held that the other remained unrevoked (*c*). Mutual Wills.

Before the Wills Act the marriage of a testator did not without birth of issue work an implied revocation, but if a Implied revocation before the Wills Act.

(*x*) *In the goods of Cooper*, Dea. & Sw. 9; *In the goods of Bangham*, 1 P. D. 429.

(*y*) *In the goods of Smith*, L. R. 1 P. & D. 717.

(*z*) *In the goods of Da Silva*, 2 Sw. & Tr. 315, *post*, Pt. I. Bk. II. Ch. IV. § I.

(*a*) *In the goods of Hugo*, 2 P. D. 73.

(*b*) *Stockwell v. Ritherdon*, 1 Robert. 661.

(*c*) *Hinckley v. Simmons*, 4 Ves. 160, *ante*, p. 7.

woman made a Will and afterwards married, the marriage alone was a revocation of her Will (*d*).

1 Vict. c. 26,
s. 18:

every Will to
be revoked by
the marriage
of the testator
or testatrix:

But now, by the 18th section of that statute (1 Vict. c. 26) it is enacted, "that every Will made by a man or woman shall be revoked by his or her marriage (*e*) (except a Will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)" (*f*).

s. 19:

no Will to be
revoked by
presumption.

This section obviously puts to rest (with respect to Wills within its operation) all questions as to implied revocations, by marriage and the birth of issue, by enacting positively that marriage alone shall be an absolute revocation. But it possibly might not apply to every instance of implied revocation by a change of condition in the testator; because it has been held, at least in the Ecclesiastical Courts, that the concurrence of marriage is not essential for the presumption of revocation in all cases. All such cases, however, appear to be provided for by the 19th section, which enacts, that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." For although, after the passing of this statute, it was held in *Marston v. Roe* *d. Fox* (*g*), that the revocation consequent on marriage and the birth of issue was not, in fact, grounded on "any presumption of an intention" of the testator to revoke, but took place in consequence of a rule or principle of law independently of any question of intention; yet in all cases of implied revocations in the Ecclesiastical Court the basis of the revocation has always been held to be the intention of the testator presumed from the

(*d*) For a statement of the law and authorities as to implied revocation of Wills before the Wills Act, see the earlier Editions of this Work: Pt. I. Bk. II. Ch. III. § v.

(*e*) Where the husband was domiciled in this country, and had been naturalized, it was held that his marriage with his deceased wife's sister was void, and did not revoke his Will under this enactment: *Mette v. Mette*, 1 Sw. & Tr. 416; cf. *Re Martin*, [1900] P. 211.

(*f*) See *Logan v. Bell*, 1 C. B. 872. The reason for this exception is, that a revocation of the Will in a case to which the exception applies would operate only in favour of those entitled under the settlement in default of appointment, and the new family of the testator would derive no benefit whatever from it. See *In the goods of Fitzroy*, 1 Sw. & Tr. 133; *In the goods of McVicar*, L. R. 1 P. & D. 671; *In the goods of Fenwick*, L. R. 1 P. & D. 319; *In the goods of Russell*, 15 P. D. 111.

(*g*) 8 A. & E. 14.

alteration in circumstances, and consequently the 19th section of the statute will prevent such revocation in future.

The enactments contained in these two sections lead to consequences which may be considered as somewhat harsh: for by reason of the former, a man's Will is revoked by his marriage without the birth of children, in a case where he had no intention to revoke it, nor any testamentary duty demanding the revocation; whereas by the operation of the latter, a Will made by a married testator stands unrevoked, notwithstanding that the subsequent birth of children unprovided for, and other concurrent circumstances, may raise a case (as in *Johnston v. Johnston* (*h*)) of the strongest inference that the testator did not mean to adhere to the Will.

There is another sort of implied revocation, in the nature of ademption, which arises either when the subject of the bequest is altered or parted with, or when the purpose, for which it was bequeathed, has been provided for by the testator by other means. But it will be convenient to postpone treating of this mode of revocation, till the subject of legacies, generally, is considered (*i*).

Implied revocation by ademption.

(*h*) 1 Phillim. 447.

(*i*) See *post*, Pt. III. Bk. III. Ch. II.

CHAPTER THE FOURTH.

THE REPUBLICATION OF WILLS.

1 Vict. c. 26 :
No Will re-
voked to be
revived (after
Jan. 1, 1838)
otherwise
than by re-
execution or
a codicil
showing an
intention to
revive it.

BY stat. 1 Vict. c. 26, s. 22, "no Will or codicil, or any part thereof, *which shall be in any manner revoked*, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, *and showing an intention to revive the same*; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

SECTION I.

How a Will may be Republished or Revived.

What
amounted to
a republica-
tion by the
law before the
Wills Act.

By the law as it stood before the passing of the Wills Act, by reason of the 5th section of the Statute of Frauds, no Will of lands could be republished, except by re-execution in the presence of three attesting witnesses, or by a codicil duly executed according to the statute. But as that section did not apply to Wills of personalty, such a Will might be republished, not only by an unattested codicil, or other writing, but by the mere parol acts or declarations of the testator (*a*). A Will of personalty stood nearly in the same situation as a Will of lands did before the Statute of Frauds;—it must have been in writing, by the provisions of the Statute of Wills, but no other formalities were necessary; and we find that, before the Statute of Frauds, and after the passing of the Statute of Wills, it was holden that a written Will of lands might be republished by parol (*b*); as where, after a Will had been revoked by operation of law, the testator *allowed* it to be his Will, without writing it

(*a*) Wentw. Off. Ex. ch. 1, p. 60, 14th edit.

(*b*) *Jackson v. Hurlock*, Amb. 494; *Beckford v. Parnecott*, Cro. Eliz. 493; 1 Saund. 277, *c, d*.

anew, it was held a republication, and that the land should pass by the Will as much as if it had never been revoked (c).

Satisfactory proof of recognition, *animo republicandi*, by the testator, was sufficient republication even of a cancelled or obliterated Will, if it continued legible (d).

Republication of a cancelled or obliterated Will.

As to republication by codicil, the cases on Wills, made before the Wills Act, show that a codicil will amount to a republication of the Will to which it refers, whether the codicil be or be not annexed to the Will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's Will whether it be so described in such codicil or not; and, as such, furnishes conclusive evidence of the testator's considering his Will as then existing (e). But although the effect of a codicil, as to republica-

Republication by a codicil: in case of Wills made before the Wills Act.

(c) 1 Roll. Abr. 617 (Z), pl. 2.

(d) Wentw. Off. Ex. ch. 1, p. 65, 14th edit.

(e) *Acherley v. Vernon*, 3 Bro. P. C. 107; *Gibson v. Lord Montford*, 1 Ves. sen. 485; *Serocold v. Hemming*, 2 Cas. t. Lee, 490; *Doe v. Davy*, Cowp. 158; *Barnes v. Crowe*, 1 Ves. 486; *Pigott v. Waller*, 7 Ves. 98; *Goodtitle v. Meredith*, 2 M. & S. 5; *Hulme v. Heygate*, 1 Mer. 285; *Rowley v. Eyton*, 2 Mer. 128; *Duffield v. Elwes*, 3 B. & C. 705; *Guest v. Willasey*, 2 Bing. 429; 3 Bing. 614; *In the goods of Crosley*, 2 Hagg. 80; 1 Saund. 278, b, *et seq.*, note to *Duppa v. Mayo*; *Williams v. Goodtitle*, 10 B. & C. 895; *Doe v. Walker*, 12 M. & W. 591; *Skinner v. Ogle*, 1 Rob. 363; *Doe v. Marchant*, 6 M. & G. 813, 825; *Dickinson v. Stidolph*, 11 O. B. N. S. 341; *Re Earle's Trust*, 4 K. & J. 673; *Re Champion*, [1893] 1 Ch. 101; *Re Wilcock*, [1898] 1 Ch. 95, following *Doe v. Marchant*, *ubi supra*; *Re Rayer*, [1903] 1 Ch. 685. So a Will or codicil containing a devise of real estates, but not duly attested, may be republished and made operative by a subsequent codicil having the requisite attestation, though the latter document be in no way annexed to the Will or codicil. But it has been held that it must distinctly refer to it. See *Doe v. Evans*, 1 Or. & M. 42; *Utterton v. Robins*, 1 A. & E. 423. So in *Re Smith*, 45 O. D. 632, Stirling, J., held, in reference to the Will of a married woman, which purported to dispose of property over which she had no disposing power during the lifetime of her husband, that a codicil executed after her husband's death, which contained no reference to her Will, and was called a codicil, did not constitute a republication of that Will, and the learned judge said that the passage in the text must be read as speaking of a codicil which refers to the Will. In the course of his judgment Stirling, J., said:—"It seems to me, then, that in order that republication may be implied, something must be found in the second testamentary instrument from which the inference can be drawn that, when making and executing it, the testator 'considered the Will as his Will.' If I apply that test to the present case, I find nothing from which I can draw any such inference, and I accordingly think that this testamentary instrument does not amount to a republication of the Will." Though a codicil confirms a Will, and for certain purposes brings down the Will to the date of the codicil, it certainly does not make the Will necessarily operate as if it had been originally made at the date of the codicil:

Old cases as to republication by codicil not obsolete.

tion, is by no means dependent on its being annexed to the Will, yet if there are several Wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that it was intended as a codicil to the Will to which it was annexed, and to no other (*f*). The authorities just cited would seem to apply to Wills made since the Wills Act, for although the 22nd section requires that in the case of revoked Wills the codicil should show an intention to revive the Will, this is no more than was necessarily implied by the finding, that the codicil so referred to the Will it revived as to become part of it, which was an essential finding under the old law.

A codicil will not republish if a contrary intention appear on the face of it.

But although the general rule as to the republishing operation of a codicil is as above stated, yet in all cases of this kind the question to be considered is, whether the particular case is or is not within the general rule (*g*): for if it appears on the face of the codicil that it was not the intention of the testator to republish, the ordinary presumption derived from the existence of the codicil will be counteracted (*h*).

It remains to consider the effect of the Wills Act on the mode of republication (*i*) or revival of Wills.

How a revoked Will can be revived since the Wills Act.

The only mode in which since the Wills Act a Will which has been revoked can be revived, is that pointed out by the 22nd section (*k*). There must be a re-execution (*l*), or a duly

Hopwood v. Hopwood, 7 H. of L. 728, 740, per Lord Campbell; *Re Park*, [1910] 2 Ch. 322. And see *Re Taylor*, [1909] W. N. 59.

(*f*) *Rogers v. Pittis*, Add. 41; *Barnes v. Crowe*, 1 Ves. 490.

(*g*) By Lord Eldon, C., in *Bowes v. Bowes*, 2 B. & P. 506.

(*h*) *Bowes v. Bowes*, 2 B. & P. 500. See also Lord Mansfield's judgment in *Heylin v. Heylin*, Cowp. 132; *Parker v. Biscoe*, 3 B. Moore, 24; *Money Penny v. Bristow*, 2 Russ. & M. 117; *Hughes v. Turner*, 3 M. & K. 666; *Doe v. Hole*, 15 Q. B. 848; *Hughes v. Hosking*, 11 Moo. P. O. 1; *Re Moore*, [1907] 1 Ir. R. 315.

(*i*) The Real Property Commissioners (4th Report, pp. 33, 34) intimate that since publication is no longer necessary for a Will (see sect. 13 of the stat. 1 Vict. c. 26) it will be improper to continue the expression republication. But it may be observed that this expression has always been in use, as a convenient term, with respect to Wills of personal estate, although no publication was ever necessary for their validity. And the 34th section of the Act itself (as was observed by Sir H. Jenner Fust in *Skinner v. Ogle*, 4 Notes of Cas. 78) distinguishes between a republication and a revival.

(*k*) A codicil reviving a revoked Will will not necessarily revive every codicil thereto. The principle is thus stated by Fry, J., in

(*l*) As to what amounts to a re-execution, see *Dunn v. Dunn*, L. R. 1 P. & D. 277.

executed codicil. There are no other means of showing an intention to revive (*m*). Destruction of the revoking instrument is not sufficient (*n*).

Green v. Tribe, 9 C. D. 231, 234: "On the one hand, where a testator in a codicil uses the word 'Will' abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the Will of the testator; and consequently where a testator by a codicil confirms in general terms 'his Will' or 'his last Will and testament,' the Will together with all codicils is taken to be confirmed. On the other hand, the testator may by apt words express his intention to revoke any codicil already made and to set up the original Will unaffected by any codicil." The learned judge goes on to say that the reference to the date of the original Will is not an indication of the intention to deprive all instruments other than the original Will itself of any force, and cites *Crosbie v. Macdoulal*, 4 Ves. 610; *Smith v. Cunningham*, 1 Add. 448; *Greenough v. Martin*, 2 Add. 239; *In the goods of De la Saussaye*, L. R. 3 P. & D. 42; *Gordon v. Lord Reay*, 5 Sim. 274; *Aaron v. Aaron*, 3 De G. & Sm. 475, as authorities for this proposition; and after pointing out that in the last two cases the codicil held to be republished was a codicil which, from defective execution, had no proper force of its own, goes on to say that the disapproval expressed by Sir G. Jessel of *Gordon v. Reay* in *Burton v. Newbery*, 1 C. D. 234, only amounted to a decision, that where recourse is had to a subsequent codicil to give vigour to an earlier one, a mere reference to the Will by its date will not operate upon the earlier and inoperative codicil so as to set it up. The two classes of cases differ essentially: in the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail: in the one class the question is, Does the later codicil revoke the earlier and operative one; in the other case you inquire, Does the later codicil set up the earlier and inoperative one: to the one class the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application: *Doe v. Hicks*, 8 Bing. 475; *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19. See also *Follett v. Pettman*, 23 C. D. 337. The same principles were applied by Sir J. Hannen, where the question was whether a codicil, referring to a Will by date, revived a revoked codicil to that Will, in the case of *In the goods of Reynolds*, L. R. 3 P. & D. 35.

(*m*) The intention to revive, and what is intended to be revived,

(*n*) *Major v. Williams*, 3 Curt. 432. The above section was much considered by Lord Penzance in the case of *In the goods of Steele*, L. R. 1 P. & D. 575, where it was laid down by his Lordship that a codicil may, by referring in adequate terms to a revoked Will, revive that Will if it be in existence, but the codicil must "show an intention to revive the same," according to the words of the section; and in order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a Will as revoked, and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court, with reasonable certainty, the existence of the intention; and that since the passing of the statute, a Will cannot be revived by mere implication. It was also laid down in the above case that references in codicils to revoked Wills by their dates were insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the Will so referred to. But the correctness of this ruling may be questioned: *In the goods of Reynolds*, L. R. 3 P. & D. 35. See *In the goods of Dennis*, [1891] P. 326; and see note (*p*), *infra*.

But it must be observed that the 22nd section is confined to Wills, &c., "*which shall be in any manner revoked.*" It is obvious, however, that, inasmuch as the old doctrine of the republication of Wills by parol acts or declarations depends on the principle that the Will so recognized becomes a new Will of the date of the recognition, no such republication can take place, in respect of any Will whatever, since the statute came into operation, because no new Will can be made, unless with the prescribed formalities. Again, it is clear that no republication can now, in any case, be effected by a codicil, unless the codicil be executed according to the exigencies of the statute; because such republication depends on the codicil becoming a part of the Will; and it cannot become a part unless it be so executed. But if it be so executed, it will still

must be gathered from the contents of the codicil itself, and evidence is not admissible in the absence of latent ambiguity to show what it was to which the testator intended to refer: *In the goods of Steele*, L. R. 1 P. & D. 575, 576; *Walpole v. Lord Orford*, 3 Ves. 402; *In the goods of Goodenough*, 2 Sw. & Tr. 141. A codicil referring inaccurately to a Will may republish it. See *Jansen v. Jansen*, cited by Sir J. Nicholl in *Rogers v. Pittis*, 1 Add. 38; *In the goods of Houblon*, 11 Jur. N. S. 549; *Lord St. Helens v. Lady Exeter*, 3 Phillim. 461; *Thompson v. Hempenstall*, 1 Rob. 783. A reference to a prior Will by date may be shown to be a mistake by internal evidence gathered from the contents of the codicil: *In the goods of Wilson*, L. R. 1 P. & D. 575, 582, read in the light of surrounding circumstances: *In the goods of May*, *ib.*; *In the goods of Whatman*, 34 L. J. P. & M. 17. Where a codicil, by mistake as to the date of a prior Will, refers to an earlier Will than that intended to be referred to, the codicil will not revive the earlier Will to which it so refers, and the codicil may be admitted to probate together with the later Will: *In the goods of Ince*, 2 P. D. 111. But where the codicil makes reference to the provisions of the earlier Will such earlier Will is confirmed and will revive; and the mistake cannot be corrected otherwise than by admitting the earlier Will to probate together with the codicil and the later Will: *In the goods of Stedham*, 6 P. D. 205; *In the goods of Dyke*, *ib.* The reference need not be by date, but may be inferred from a reference in the reviving codicil to the contents of the Will intended to be revived: *In the goods of McCabe*, 2 Sw. & Tr. 478. It is to be observed that even if a codicil refer to a Will with the intention of reviving it, and it turns out that such Will has been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival: *In the goods of Steele*, L. R. 1 P. & D. 575, 576; *Hale v. Tokelove*, 2 Rob. 318; *Newton v. Newton*, 5 L. T. N. S. 218; *Rogers v. Goodenough*, 2 Sw. & Tr. 342; *In the goods of Steele*, L. R. 1 P. & D. at pp. 576, 577; *In the goods of Reade*, [1902] P. 75. When a testator refers in a codicil to a last Will, and there is nothing in the contents of the codicil to point to any particular Will, it must be construed to refer to the Will in legal existence as to the last Will and not to a revoked Will: *Hale v. Tokelove*, 2 Rob. p. 326. A codicil which is expressed to take effect only in an event which does not happen, republishes, it should seem, a Will to which it refers by date, and it is on this ground entitled to probate: *In the goods of Da Silva*, 2 Sw. & Tr. 315.

amount to a republication of the Will, according to the old law, unless it appears, on the face of it, that it was not the intention of the testator to republish (*o*); or unless the Will has been in some manner revoked, in which case the statute further requires that the codicil should show an intention to revive the Will (*p*).

By sect. 34,—“This Act shall not extend to any Will made before the first day of January, 1838.”

The result appears to be this: that a republication or revival by parol acts or declarations, or by an unattested codicil or other writing, according to the old law, shall be valid, if it took place before the 1st of January, 1838; but that, after the expiration of the year 1837, no republication shall be effectual unless by re-execution, according to the solemnities required by the statute for an original Will, or by a codicil executed in the same manner, notwithstanding the Will itself may have been executed before the 1st of January, 1838 (*q*). Result.

(*o*) *Doe v. Walker*, 12 M. & W. 591; *Skinner v. Ogle*, 4 Notes of Cas. 74. Republication of Wills which are unrevoked has ceased to be a matter of so much importance, since now, by sect. 24 of the Wills Act, every Will is construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will.

(*p*) A Will and codicil revoked, under the Wills Act, by the marriage of the testator, were held to be revived by a codicil made after the marriage and duly attested, though it did not expressly confirm or revive any particular Will, but referred merely to “the last Will of me,” and “my said Will” (it not appearing that more than one Will of the testator was in existence): *Neate v. Pickard*, 2 Notes of Cas. 406. See also accord. *In the goods of Terrible*, 1 Sw. & Tr. 140. Again, where one part of a Will in duplicate remained undestroyed in the possession of the testator, but the other part in the possession of his solicitor had been destroyed by the testator on the execution of a subsequent Will made in 1838, in terms revoking the prior Will, it was held that such prior Will was revived by a codicil, made subsequently to the second Will, though referring to the prior Will merely by date; for that such reference sufficiently showed “an intention to revive”: *Payne v. Trappes*, 1 Rob. 583. Lord Penzance, however, said that the decision proceeded upon the ground that the judge was convinced of the testator’s intention, not that he felt bound by the language in the face of an opposite conviction: that there may be little beyond the reference by date to show the intention to revive, but the Court did not in *Payne v. Trappes* (*ubi supra*) say that the date alone was sufficient: *In the goods of Steele*, L. R. 1 P. & D. 575, 578. See also *Hale v. Tokelove*, 2 Rob. 318. But the physical annexation (by a piece of tape, *e.g.*) of a duly executed codicil of a later date to testamentary papers duly executed but revoked, is no ground for inferring the “intention to revive” required by the statute. And it should seem that such intention can only be shown by the contents of the codicil itself: *Marsh v. Marsh*, 1 Sw. & Tr. 528.

(*q*) *Hobbs v. Knight*, 1 Curt. 768, 774; *De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468, 512; *Noble v. Phelps*, L. R. 2 P. & D. 282. So, conversely, a Will of lands made before January 1, 1838, and revoked, may be republished after that day by a codicil attested by two witnesses only: *Andrews v. Turner*, 3 Q. B. 177.

SECTION II.

The Consequences of Republication.

The Will republished is a new Will of the date of the republication;

It has long been settled law that the republication of a Will is tantamount to the making of that Will *de novo*; it brings down the Will to the date of the republishing, and makes it *speak*, as it were, *at that time*. In short the Will so republished is a new Will.

it revokes any other Will, of a date prior to that of republication;

Consequently, upon the ordinary and universal principle that, of any number of Wills, the last and newest is that in force, it revokes any Will of a date prior to that of the republication (*r*).

distinction between Wills and codicils.

But there is a great distinction between Wills and codicils as to what is revoked: for as every codicil is, in construction of law, a part of the Will, a testator by expressly referring to, and confirming the Will, will not be considered as intending to set it up against a codicil or codicils, revoking it in part. And, therefore, in a case where a testator made his Will, and afterwards executed several codicils thereto, containing partial alterations of, and additions to the Will; and by a further codicil, referring to the Will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the Will; this confirmation of the Will was held not to revive the parts of it which were altered or revoked by the former codicils; Lord Alvanley, M. R., observing, that if a man ratifies and confirms his last Will he ratifies and confirms it with every codicil that has been added to it (*s*).

(*r*) *Rogers v. Pittis*, 1 Add. 38. This proposition seems to be true, notwithstanding the fact that a later Will is not necessarily a revocation of earlier Wills, because, where such Wills are not inconsistent, the series of Wills may together constitute the last Will of the testator; for it would seem that, if a man republishes one of the earlier Wills in a series, he is either republishing a Will which is inconsistent with the later Wills in the series, or he is republishing a part of a Will constituted by the series to the exclusion of the later parts, and *quâcunque viâ* the testamentary papers later than that republished are revoked.

(*s*) *Crosbie v. MacDougal*, 4 Ves. 610; *In the goods of De la Sausaye*, L. R. 3 P. & D. 42. It is to be remembered that since the decision in *Cutto v. Gilbert*, 9 Moo. P. C. 131 (*ante*, p. 119), the fact that the revoking instrument is a Will does not necessarily make it revoke prior testamentary instruments. The question as to what is revoked is always a question of intention: *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19; *Green v. Tribe*, 9 C. D. 231; *Follett v. Pettman*, 23 C. D. 337. Where there are several codicils of different dates, it will always be a question to be determined from the contents of the codicils, and (at all events, in a Court of Probate) from all other

In a case where a Will and codicil, which had been revoked, under the Wills Act, by the testator's marriage, was revived by a codicil referring to the Will, several alterations appeared on the face of the Will: And it was held by Sir H. Jenner Fust, that the codicil revived the Will as it stood at the time of republication, being of opinion that it was the intention of the deceased in the alterations to revoke the altered legacies, and that therefore he could not have intended to revive that part of the Will which he had revoked before (*t*).

Although by 1 Vict. c. 26, s. 24, every Will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will, yet there is another consequence of a republished Will being considered as a new Will of the date of the republication which is still important, *viz.*, that the operation of the Will is by republication extended to subjects which have arisen between its date and republication. As if one give to Sarah his wife a piece of plate, or other thing, and hath no such wife at the time, but after marriage one of that name, and then publisheth the Will again; now this shall be a good bequest (*u*). And so far has the doctrine that a republication gives words, used in the original Will, the same force and effect as they would have had if first written at the time of the republication, been extended, that it has been considered that a bequest may extend to *any person* to whom the description is applicable at the period of republication, though not originally intended (*x*). So if one devise goods which he hath not, if he after do purchase the same, and then say that his Will before made shall stand or be his Will, it shall be a good Will and bequest: for this in effect is a new making (*y*). So where a

Republication extends the operation of the Will to persons to whom the description is applicable at date of republication:

So also as to property to which the description is applicable:

circumstances of the case, whether the later are cumulative to, or substituted for, and revocatory of the former; and if upon the face of a testamentary document and the facts known to the testatrix at the time of its execution, it is doubtful whether the testatrix intended altogether to revoke a former Will, the Court will admit parol evidence to ascertain the intention: *Methuen v. Methuen*, 2 Phillim. 416; *Greenough v. Martin*, 2 Add. 239; *Thorne v. Rooke*, 2 Curt. 799; *Upfill v. Marshall*, 3 Curt. 636; *Jenner v. Ffinch*, 5 P. D. 106; *Chichester v. Quatrefages*, [1895] P. 186; *ante*, p. 122. See also *post*, Pt. I. Bk. IV. Ch. II. § V.

(*t*) *Neate v. Pickard*, 2 Notes of Cas. 406.

(*u*) 1 Wentw. Off. Ex. c. 1, p. 62, 14th edition.

(*x*) *Perkins v. Micklethwaite*, 1 P. Wms. 275. See sect. 34, *post*, p. 148.

(*y*) 1 Wentw. Off. Ex. c. 1, p. 62.

man had devised a lease to his daughter, and afterwards renewed the lease, which was held to amount to a revocation by ademption of the lease originally bequeathed; it was holden, that the renewed lease passed by means of a codicil made after the renewal, which, although it took no notice of the lease, operated as a republication of the Will (z).

Secus, as to a Will of a married woman made merely in the exercise of a power.

But it has been held that in the case of a married woman, whose Will is only the exercise of a power, her republication of it by a codicil made after her husband's death has not necessarily the effect of extending the operation of the Will so as to make it include that which was not included in the power given to her to make the Will: Thus, where a married woman, by her Will dated in 1824, and made in exercise of a power, duly appointed and devised certain hereditaments therein specified, and also all other the hereditaments, if any such there were, which she had any power to appoint and devise, and afterwards, when a widow, in the year 1829, made a codicil, whereby she gave some legacies, but did not dispose of the residue of her estate, and she confirmed all Wills and codicils which she had theretofore made, it was held by Sir J. Romilly, that the Will, as confirmed, passed only such hereditaments as were subject to her power, and not certain other hereditaments to which she had become entitled at the date of the codicil; for that the codicil did not extend or enlarge the appointment, so as to make it a devise of that which was not contained in the power (a).

Distinction between Wills of realty and personalty in this respect.

This consequence of republication was not so important with respect to personalty as it was with regard to realty, before the passing of the Wills Act (1 Vict. c. 26); because a Will of personalty, if it contained words sufficiently comprehensive, would operate on the personal estate of the testator, to which those words applied, although acquired since the making of the Will, without any republication of it (b): whereas no real estate which the testator had not at the date of the Will would pass by it, however express, comprehensive, and general the

(z) *Alford v. Earle*, 2 Vern. 208; *S. C.*, cited under the name of *Alford v. Alford*, 3 P. Wms. 168. See also *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Porter v. Smith*, 16 Sim. 251.

(a) *Du Hourmelin v. Sheldon*, 19 Beav. 389; *Re Smith*, 45 C. D. 632; and see *ante*, p. 38 *et seq.*

(b) See *post*, p. 148. As to the ademption of legacies, and the revival of adeemed legacies by republication, see Pt. III. Bk. III. Ch. III.

words, or however manifest the intention of the testator might be (c). Consequently no after-purchased lands could pass, nor any lands which did not remain in the same condition from the date of the Will to the death of the testator, unless there were a republication, according to the solemnities required by the Statute of Frauds; for any the least alteration, or new modelling of the estate after the Will, was an actual revocation (d).

But now, by stat. 1 Vict. c. 26, s. 3, the power of disposing by Will executed as required by that Act is extended to all such real estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his Will.

It will be convenient here to refer to the 24th section of the same statute, which enacts, "that every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will." To prevent the application of this section, an intention must be shown excluding the effect given to the Will by the statute—namely, the effect of a continuing operation during the subsequent life of the testator (e). Thus, where, in a Will bearing a date, the testator gave "all the estates of which I am now seised and possessed," Lord Cottenham held that the testator had thereby indicated a contrary intention (f).

1 Vict. c. 26,
s. 3 :

1 Vict. c. 26,
s. 24 ;
Will con-
strued to
speak from
death of
testator,
unless a con-
trary inten-
tion shall
appear by
the Will :

(c) 1 Saund. 277, *e*, note to *Duppa v. Mayo*.

(d) 1 Saund. 278, *e*, note to *Duppa v. Mayo*.

(e) Per Lord Westbury in *Thomas v. Jones*, 1 De G. J. & Sm. 83.

(f) *Colé v. Scott*, 1 Mac. & G. 518; 16 Sim. 259. In the course of the argument, however, his Lordship said he admitted the word "now" would, under the Act, be the time of the death if there was no date to the Will: *Langdale v. Briggs*, 3 Sm. & G. 253, 254; 8 De G. M. & G. 437; *Re Ord*, 12 C. D. 22, 25; *Re Horton*, [1920] 2 Ch. 1. And see *Everett v. Everett*, 7 C. D. 428. As to whether the section is to be applied to an excepting clause, see *Hughes v. Jones*, 1 Hemm. & M. 765, 770. The fact that a Will is made before a settlement creating a general power will not afford ground for holding that such contrary intention appears by the Will as that it will not execute the power created by the settlement: *Boyes v. Cook*, 14 C. D. 53; *Airey v. Bower*, 12 App. Cas. 263. Sect. 24 of the Wills Act does not apply to limited powers of appointment: *Re Hayes*, [1900] 2 Ch. 332; affirmed, [1901] 2 Ch. 529. And see same case as to whether it is possible as a matter of law to execute by anticipation a special power not created until after the alleged execution. A power to appoint generally by a Will or codicil expressly referring to the power is not a power giving the donee "power to appoint in any

Specific gifts
are within
sect. 24,

if words of
description
not inapt,

or though
partially
inapt subject-
matter of
bequest is
sufficiently
identified.

Specific gifts are within sect. 24, so as to make the Will cover after-acquired property, if the description admits of it and a contrary intention does not appear by the Will (*g*). When a bequest is of that which is generic, of that which may be increased or diminished, then the Wills Act requires something more on the face of the Will for the purpose of indicating such contrary intention than it does when the Will refers to a particular thing (*h*). But the words of the gift may, from inaptness of description, exclude after-acquired property of the same kind, even though no contrary intention should appear by the Will. Thus where A. devised "my cottage and all my land at S.," and A. subsequently contracted to purchase a large mansion house, it was held that, construing the Will as made immediately before the death of the testator, the words used did not sufficiently describe the big house: but that if A. had simply devised "all my land at S.," then the big house would have been included (*i*). A bequest, if specific under the old law, remains specific, but is enlarged as to its effect by the operation of the enactment, not that the nature of the bequest is altered at all (*k*).

The difficulty arising from the partial inapplicability of the words of the Will to the condition or form of the subject-matter of bequest at the time of the death often arises when the testator at the date of making his Will is possessed of leasehold property, but before his death may have purchased the reversion,

manner he may think proper" within the meaning of sect. 27 of the Wills Act, and such section does not therefore apply to such a case: *Phillips v. Cayley*, 43 C. D. 222; overruling *Re Marsh*, 38 C. D. 630.

(*g*) *Trinder v. Trinder*, L. R. 1 Eq. 695; *Re Gibson*, L. R. 2 Eq. 669. And see the remarks of Cairns, L. C., in *Morrice v. Aylmer*, L. R. 10 Ch. 148. See further, as to the construction of sect. 24, *Douglas v. Douglas*, Kay, 400; *Bullock v. Bennett*, 1 Kay & J. 315; 7 De G. M. & G. 283; *Goodlad v. Burnett*, 1 Kay & J. 341; *Jepson v. Key*, 2 Hurl. & C. 873; *Langdale v. Briggs*, 3 Sm. & G. 246; 8 De G. M. & G. 391, 437; *Re Otley Railway*, 34 L. J. Ch. 596; *S. C.* 11 Jur. N. S. 818; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Re Ord*, 9 C. D. 667; 12 C. D. 22; *Saxton v. Saxton*, 13 C. D. 359; *Re Russell*, 19 C. D. 432; *Re Portal and Lamb*, 27 C. D. 600; reversed, 30 C. D. 50; *Re Knight*, 34 C. D. 518; *Re Alexander*, [1910] W. N. 36; *post*, Pt. III. Bk. III. Ch. IV. § VIII.

(*h*) *Goodlad v. Burnett*, 1 K. & J. 341.

(*i*) *Re Portal and Lamb*, 30 C. D. 53; cf. *Re Gillins*, [1909] 1 Ch. 345; *Re Evans*, [1909] 1 Ch. 784; *Re Willis*, [1911] 2 Ch. 563.

(*k*) Turner, L. J., in *Langdale v. Briggs*, 8 D. G. M. & G. 391, quoted with approval by Jessel, M. R., in *Bothamley v. Sherson*, L. R. 20 Eq. 304. But Lindley, L. J., in *Re Portal and Lamb*, *ubi supra*, expressed his opinion that this section leaves open the question whether a particular property passes by the specific or the residuary devise.

and the property may thus have become freehold. The construction will depend upon whether the words of description, though partially inapt, sufficiently identify the subject-matter of bequest. The clause in the statute says that the Will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death, and if there is nothing in the Will to confine its operation to the interest which the testator had at the date of the Will, the mere method which the testator adopts of describing his property does not bind him to that and nothing else (l).

The remarks of Malins, V.-C., in *Saxton v. Saxton* (*ubi sup.*), throw doubt on the authority of *Emuss v. Smith* (m), an early case in which it was held that a bequest of a leasehold garden, the reversion of which was afterwards purchased, was adeemed by the subsequent conveyance of the fee to the testator, and formed part of his residuary estate. When, however, it is not merely that the testator's description is inapt to define the condition of the property at the time of his death, but the words coupled with the evidence of the testator's surroundings fail to identify the subject-matter itself, it appears that the property will not pass under the bequest. So where a testator gave the lease of the house in which he should be living at the time of his decease to his wife, and at the date of the Will he was living in a house he held for a short time at rack rent, and he subsequently bought and went to reside in a freehold house where he died, it was held that the freehold house was not devised to the testator's widow (n).

(l) *Saxton v. Saxton*, 13 O. D. 359; *Cox v. Bennett*, L. R. 6 Eq. 422; *Miles v. Miles*, L. R. 1 Eq. 462.

(m) 2 De G. & Sm. 722.

(n) *Re Knight*, 34 O. D. 518. See also *Blagrove v. Coore*, 27 Beav. 138. In the case of *Wedgwood v. Denton*, L. R. 12 Eq. 290, it was held that a Will bequeathing a house which a testatrix held for the life of T. K., and the term of twenty-one years after, passed a leasehold interest in the same house for seventy-five years which the testatrix had obtained since the date of the Will on the surrender of the original lease, or at all events that an interest passed for the period of twenty-one years from the death of T. K.

As to what evidence is admissible of the surroundings of the testator, both at the date of his Will and subsequently up to his death, see *Castle v. Fox*, L. R. 11 Eq. 542. In that case the testator devised "Cleve Court with the appurtenances," and Malins, V.-C., held that the whole of the evidence showing what the testator treated as part of the Cleve Court estate, not only before but between the date of his Will and his death, was as legitimate as any evidence that could be given, for the purpose of putting the Court in the position of the testator. Where a testator uses language which is not in itself definite,

Sect. 24 puts real property on same footing as personal property previously stood.

Section 24 in effect puts the case of real property on the same footing as that on which personal property already stood: For the general rule, as to Wills of mere personalty, established before the Wills Act passed, was, that they speak from the day of the testator's death, and are not referable to the state of the property at the time of making the Will, unless there are expressions in the Will showing it was intended to describe property with reference to the day of the date of the Will, and not to the day of the death (*o*): but some more specific indication of a contrary intention is now required than was thought sufficient before the Wills Act (*p*).

Effect of s. 24.

It has been decided that the effect of this section is not to make a Will valid, which was invalid in its inception (*e.g.*, a Will of a married woman unauthorised by a Power), but to give a rule for the construction of a valid testamentary instrument (*q*). But the Will of a married woman is not excluded by the 8th section from the operation of this section (*r*).

Will of married woman not excluded by s. 8 from the operation of s. 24:

With respect to the description of persons in the Will, the law remains as before the passing of the Act (*s*).

1 Vict. c. 26, s. 34: a Will republished, &c.,

It is further enacted by the 34th section, that "every Will re-executed, or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the

but is to a certain extent popular, and does not point out the subject referred to by any strict boundary, then the Court will apply the knowledge, that it may acquire from extrinsic circumstances, to the interpretation of the words he has used in his Will, and when the Court arrives at anything which completely exhausts the whole of those words, then, and not till then, is there a restriction in the inquiry and examination into extrinsic circumstances: *Webb v. Byng*, 1 K. & J. 580. See also *Doe v. Jersey*, 3 B. & O. 870; *Okefen v. Clifden*, 2 Russ. 309; *Re Skillen*. [1916] 1 Ch. 518.

(*o*) *Cole v. Scott*, 1 Mac. & G. 529; *post*, Pt. III. Bk. III. Ch. IV. § VIII. See *Douglas v. Douglas*, Kay, 400, 404, and *Goodlad v. Burnett*, 1 K. & J. 341, 347, 348, as to cases where the testator bequeathed the whole of some one *genus* of his property, as "all debts due to me on bond," or, all "my stock." The effect of the Wills Act on cases of this kind will be considered hereafter. See Pt. III. Bk. III. Ch. IV. § VIII.

(*p*) *Goodlad v. Burnett*, 1 K. & J. 341. See *Re Clifford*, [1912] 1 Ch. 29.

(*q*) *Price v. Parker*, 16 Sim. 198, 202, *ante*, p. 39; *Noble v. Phelps*, L. R. 2 P. & D. 276. Nor did the Married Women's Property Act, 1882, alter the law in this respect: *Re Price*, 28 C. D. 709, *ante*, p. 39.

(*r*) *Thomas v. Jones*, 1 De G. J. & S. 62; *Noble v. Phelps*, L. R. 2 P. & D. 276. See also *Willock v. Noble*, L. R. 7 H. L. 590, per Cairns, C., and *ante*, p. 39; and see now Married Women's Property Act, 1893.

(*s*) *Bullock v. Bennett*, 7 De G. M. & G. 283. See *ante*, p. 143.

time at which the same shall be so re-executed, republished, or revived."

A codicil duly executed will give effect and operation to unattested alterations in a Will (*t*): or to unexecuted papers, which have been written between the periods of the execution of the Will and codicil, where the Will is treated as executed on the date of the codicil and read, as speaking at that date, contains language which, within the principle of *Allen v. Maddock* (*u*), would operate as an incorporation of the document to which it refers. But, when this is not the case, the mere fact of unexecuted papers having been written or signed, between the date of the Will and that of the codicil, will not suffice to add such papers to the Will by force of republication, or to make that testamentary which would not have been so, if the Will had been originally executed at the later date (*x*).

The general question whether, and in what cases, an unexecuted Will or other paper may be rendered valid as a testamentary disposition by a subsequent duly executed codicil, has been already considered in an earlier part of this Work (*y*).

A testator having, after the Wills Act came into operation, duly executed two wholly inconsistent Wills, destroyed the earlier one *animo revocandi*, and then duly executed a codicil, showing an intention to revive it. Dr. Lushington held that this codicil necessarily revoked the later Will, though it might be inoperative to revive the earlier one by reason of its having been so destroyed. The learned judge further expressed the inclination of his opinion (though it was not necessary to decide the question) that probate could not be decreed of the draft of the destroyed Will; for that it was an unexecuted paper, not specifically adverted to or recognised by the codicil. But he gave no opinion on the point (which indeed does not appear to have been raised), whether, as in the case of a lost Will or a Will destroyed unduly or *sine animo revocandi* (*z*), probate might have been granted of the Will itself, as contained in the draft and the depositions of the witnesses (*a*).

shall be deemed to have been made when republished: A codicil may give effect to unattested alterations or additions to the Will:

or may render valid a previous unexecuted Will, &c.

Effect of codicil showing intention to revive a destroyed Will.

(*t*) Per Sir H. Jenner Fust, in *Skinner v. Ogle*, 4 Notes of Cas. 79; *In the goods of Wyatt*, 2 Sw. & Tr. 494. But see *Re Hay*, [1904] 1 Ch. 317.

(*u*) 11 Moo. P. C. 427.

(*x*) *In the goods of Truro*, L. R. 1 P. & D. 201; *In the goods of Lancaster*, 29 L. J. P. & M. 155.

(*y*) *Ante*, Pt. I. Bk. II. Ch. II. § II.

(*z*) See *post*, Pt. I. Bk. IV. Ch. II. § VII.

(*a*) *Hale v. Tokelove*, 2 Rob. 318.

This decision was approved and acted on by Sir C. Cresswell as establishing the principle that where a Will had been destroyed by the testator, or with his approval, it cannot be revived by any intention of his manifested in a subsequent codicil (b).

Effect of
republi-
cation
by a widow:

It has been already observed, in dealing with the law prior to the passing of the Married Women's Property Act, 1893, that although a Will made by a woman before or during coverture, would not revive by the mere circumstance of her husband's death, yet, if she republished it after his death, it became valid (c). Likewise, although if the testator make his Will while *non compos*, and afterwards recover his understanding, the Will does not thereby obtain any force or strength (d); yet if he should, after having regained a sound state of mind, republish the Will made during his former insanity, it would doubtless become a valid Will.

by a person
formerly of
non-sane
memory, who
has recovered
his under-
standing.

(b) *Rogers v. Goodenough*, 2 Sw. & Tr. 342; *In the goods of Steele*, L. R. 1 P. & D. 575. The learned judge, moreover, held that the codicil did not revoke an intermediate Will, not being inconsistent therewith and not showing any intention to revoke it. See also *In the goods of Law*, 21 L. T. 399.

(c) *Ante*, pp. 39, 42. See *Du Hourmelin v. Sheldon*, cited *ante*, p. 144.

(d) Swinb. Pt. 2, s. 3, pl. 2; Godolph. Pt. 1, c. 8, pl. 2.

BOOK THE THIRD.

THE APPOINTMENT OF EXECUTORS, AND THE ACCEPTANCE OR REFUSAL OF THE OFFICE.

THE word Executor, as the term is at present accepted, may be defined to be the person to whom the execution of a last Will and Testament is, by the testator's appointment, confided (*a*). "To appoint an executor," says Swinburne (*b*), "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his Will."

Definition of term "executor."

The bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a Will, and as a Will it is to be proved (*c*).

Bare nomination of executor entitles Will to probate.

(*a*) 2 Black. Comm. 503; *Farrington v. Knightly*, 1 P. Wms. 548, 549; Toller, 30.

(*b*) Swinb. Pt. 4, s. 2, pl. 2; *Brownrigg v. Pike*, 7 P. D. 61—64.

(*c*) Godolph. Pt. 2, c. 5, s. 1; *Brownrigg v. Pike*, 7 P. D. 61—64; *In the goods of Lancaster*, 1 Sw. & Tr. 464. See post, Pt. I. Bk. IV. Ch. II. § IX.

CHAPTER THE FIRST.

WHO IS CAPABLE OF BEING AN EXECUTOR.

Who may be
an executor.

GENERALLY speaking, all persons who are capable of making Wills, and some others besides, are capable of being made executors (*a*). From the earliest time it has been a rule that every person may be an executor, saving such as are expressly forbidden (*b*).

The King.

It seems to be admitted that the King may be constituted executor; in which case he appoints such persons as he shall think proper to officiate the execution of the Will, against whom such as have cause of action may bring their suits; also the King may appoint others to take the accounts of such executors (*c*). Thus, Katherine, Queen Dowager of England, mother of Henry the Sixth, made her last Will and Testament, and thereof constituted King Henry the Sixth her sole executor: Whereupon the King appointed Robert Rolleston, keeper of the great wardrobe, John Merston, and Richard Alreed, esquires, to execute the said Will, by the oversight of the Cardinal, the Duke of Gloucester, and the Bishop of Lincoln, or two of them, to whom they should account (*d*).

Corporations.

Doubts have been entertained whether a Corporation aggregate can be executor; principally because they cannot prove a Will, or at least cannot take the oath for the due execution of the office (*e*). But there are authorities in favour of the capa-

(*a*) 2 Black. Comm. 503.

(*b*) Swinb. Pt. 5, s. 1, pl. 1.

(*c*) Godolph. Pt. 2, c. 1, s. 2.

(*d*) 4 Inst. 335.

(*e*) 1 Black. Comm. 477; Com. Dig. Admon. B. (2); Went. Off. Ex. c. 1, p. 39, 14th edit. The other grounds of the last-mentioned author's doubt are stated to be: 1st, Because they cannot be feoffees in trust, to others' use; 2ndly, They are a body framed for a special purpose. The Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), removes the common law disability of a corporation holding land in joint tenancy. There would seem to be now no objection to a corporation being appointed a trustee jointly with a continuing trustee: *Re Thompson's Settlement Trusts*, [1905] 1 Ch. 229.

bility (f); and it is said to be now settled, that on their being so named, they may appoint persons styled Syndics, to receive administration with the Will annexed, who are sworn like other administrators (g). No doubt appears ever to have been entertained but that a corporation sole may be executor (h).

Where a testator in India nominated his brother, and "Messrs. Cockerell & Co., East India agents, London," and one A. B., to be his executors, and before his death the firm of Cockerell & Co., which consisted of four members, had been dissolved, Sir H. Jenner Fust held that the appointment was not of the firm collectively, but of the persons composing it individually, and that each of the members was entitled to be joined in the probate with the other executors (i). A Partnership Firm.

By the Naturalization Act, 1870, an alien has the same capacity of taking, acquiring, holding and disposing of property as if he were a natural-born British subject (k), and is therefore capable of being an executor (l). Aliens.

An infant may be appointed executor, how young so ever he be (m), and even a child *in ventre sa mere* (n), (who is considered in law, to all intents and purposes, as actually born)(o), and if so appointed, and the mother bring forth two or three children at that one birth, they are all to be admitted executors (p). But if an infant be appointed *sole* executor, by statute 38 Geo. III. c. 87, s. 6, he is altogether disqualified Infants.

38 Geo. III. c. 87; sole executor cannot act till 21 years old:

(f) Swinb. Pt. 5, s. 9; Godolph. Pt. 3, c. 1, s. 1; 1 Roll. Abr. tit. Executors, T. 7, citing 12 E. 4, 9, b; *In the goods of Hunt*, [1896] P. 288, where a company was appointed executor and the grant was made to their manager. But probate will not be granted to a body corporate and individuals jointly: *In the goods of Martin*, 90 L. T. 264; cf. *Re Thompson's Settlement*, *supra*.

(g) 3 Bac. Abr. by Gwillim, p. 5, tit. Executors, A. 2; Toller, 30, 31; *In the goods of Darke*, 1 Sw. & Tr. 516; *In the estate of Rankine*, [1918] P. 134. But the grant will not be made until the appointment of Syndics is before the Court: *ibid*.

(h) Godolph. Pt. 2, c. 6; Wentw. Off. Ex. p. 39, 14th edit. See *In the goods of Haynes*, 3 Curt. 75. The Public Trustee is a corporation sole and may accept probate or letters of administration: Public Trustee Rules, 1907, r. 7.

(i) *In the goods of Fernie*, 6 Notes of Cas. 657.

(k) See stat. 33 & 34 Vict. c. 14, s. 2. See *ante*, p. 8.

(l) As to the question of the capability of aliens to be executors prior to the passing of the above Act, see the earlier Editions of this Work, Pt. I. Bk. III. Ch. I.

(m) Wentw. Off. Ex. c. 18, p. 390, 14th edit.; Swinb. Pt. 5, s. 1, pl. 6.

(n) Godolph. Pt. 2, c. 9, s. 1.

(o) 2 Saund. 387, note to *Purefoy v. Rogers*.

(p) Godolph. Pt. 2, c. 9, s. 1.

from exercising his office during his minority, and administration, *cum testamento annexo*, shall be granted to the guardian of such infant, or to such other person as the Court shall think fit, until such infant shall have attained the age of twenty-one years (*q*). This Act only applies in case of an infant being sole executor; for if there are several executors, and one of them is of full age, no administration *durante minore ætate* ought to be granted; for he who is of full age may execute the Will (*r*).

whether if an infant executrix take husband of full age he shall have the execution.

It has been said, that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have the execution of the Will (*s*): and in *Prince's Case* (*t*), it was resolved by the justices of the Common Pleas, that if administration be committed during the minority of the executrix, and she take husband of full age, then the administration shall cease. But this has been doubted (*u*), and since the passing of the Married Women's Property Act, 1882, these cases would appear to have no longer any application (*x*).

Feme covert :

Formerly a married woman could not by the Law of England take upon her the office of executrix or administratrix without the consent of her husband. But now by the Married Women's Property Act, 1882, [which came into force Jan. 1, 1883] it is enacted (sect. 1, sub-s. 2), "that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract . . . as if she were a *feme sole*," and that (sect. 24) "the word 'contract' in the Act shall include the acceptance of any trust or of the office of executrix or administratrix" The Act also (sect. 18) enables a married woman who is an executrix or administratrix alone or jointly with any person or

Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

s. 1 (sub-s. 2) :

s. 24.

s. 18.

(*q*) See *In the goods of Stewart*, L. R. 3 P. & D. 244; *post*, Pt. I. Bk. v. Ch. III. § III. Before the passing of this Act the law considered him capable of acting as executor at the age of seventeen: *Godolph. Pt. 2*, c. 9, s. 2; *Swinb. Pt. 5*, s. 1, pl. 6.

(*r*) *Pigot and Gascoigne's Case*, cited *Brownl. 46*; *Foxwist v. Tremaine*, 1 Mod. 47, by Twysden, J. See further, *post*, Pt. I. Bk. v. Ch. III. § III., as to infant executors and administration *durante minoritate*. See also 2 Williams' Notes to Saunders, 637.

(*s*) *Wentw. Off. Ex. c. 18*, p. 392; *Toller*, 31.

(*t*) 5 Co. 29, b.

(*u*) See *post*, Pt. I. Bk. v. Ch. III. § III.

(*x*) See sect. 24. Since this Act it is not necessary that the husband should join in the administration bond: *In the goods of Ayres*, 8 P. D. 168.

persons of the estate of any deceased person to act in such office as if she were a *feme sole* for purposes of action, transfer of stock, &c., without any consent on the part of her husband.

These sections would seem to apply to any married woman whether married before or after the commencement of the Act. It has therefore become unnecessary, with respect to cases falling within the above Act, to consider the question as to the consent of the husband, as the wife as such executrix or administratrix now acts independently of him in all respects as if she were a *feme sole*, and now by the Married Women's Property Act, 1907 (*y*), she is able without her husband to dispose of or join in disposing of real or personal property held by her solely or jointly as personal representative as if she were a *feme sole*.

Extent of application of Married Women's Property Act.

There are few or none, who, by our law, are disabled, on account of their crimes, from being executors: and therefore it has always been holden, that persons attainted or outlawed may sue as executors, because they sue *in auter droit*, and for the benefit of the parties deceased (*z*). And it has been decided that a person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a Court of Probate with a view of establishing the validity of the Will by which he is appointed executor; for that his office being *in auter droit* was not forfeited by the conviction (*a*). By the civil and canon law, indeed, not only traitors and felons, but heretics, apostates, usurers, famous libellers, incestuous bastards, and many others, are incapable of being executors (*b*).

Persons attainted and outlawed.

The Trustee Act, 1893, s. 48, provides that "property vested in any person on any trust or by way of mortgage shall not, in

(*y*) 7 Edw. VII. c. 18, s. 1.

(*z*) Wentw. Off. Ex. 36, 14th edit.; Godolph. Pt. 2, c. 6, s. 1; Vin. Abr. tit. Outlawry, n. a. pl. 2. So a villein was capable of being an executor: Swinb. Pt. 5, s. 1, pl. 3; Off. Ex. 36, 14th edit.; and the lord could not seize those goods which he had to the use of the deceased; and he might sue his lord for a debt due to the testator: Lit. B. 2, c. 11, s. 192. But it was held that an outlaw could not move to have an attorney's bill taxed, where he (the outlaw) was administrator, with the Will annexed, by which all the personal estate was bequeathed to him, subject to payment of the debts, &c., and one of the bills which he sought to tax related to business done for himself and the testatrix jointly, and the other to business done for the testatrix alone: *Re Mander*, 6 Q. B. 867.

(*a*) *Smethurst v. Tomlin*, 2 Sw. & Tr. 143; but see *Re Hall*, [1914] P. 1. Nor will the Court pass over an executor by reason of his bad character only: *In the goods of Samson*, L. R. 3 P. & D. 48.

(*b*) Swinb. Pt. 5, ss. 2, 3, 4, 7, 9, 10; Godolph. Pt. 2, p. 6.

case of that person becoming a convict within the meaning of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee." Under sect. 50, the expression "trust" includes "the duties incident to the office of personal representative of a deceased person." Sect. 25 (1) of the same Act enables the Court to make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt; but by sub-sect. 3 "nothing in this section shall give power to appoint an executor or administrator."

Persons in
mean or insol-
vent circum-
stances :

The Court cannot refuse to grant the probate of a Will to a person appointed executor, on account of his poverty or insolvency. Therefore, where, to a *mandamus* to the judge of the Prerogative Court, to grant the probate of a Will to a person named executor therein, the Ordinary returned that he was an absconding person, and insolvent, and that he refused to give caution to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the Ordinary has no authority to interpose and demand caution of the executor when the testator himself required none (c).

bankrupt :

So where, after probate of the Will, the executor became bankrupt, and a suit was commenced in the Ecclesiastical Court to revoke the probate, and grant administration to another; the Court of Queen's Bench granted a prohibition (d).

(c) *Rex v. Sir Richard Raines*, 1 Lord Raym. 361; *S. C.*, 1 Salk. 299; 3 Salk. 162; 1 Stra. 672; Carth. 457; Holt, 310; *Hathornthwaite v. Russell*, 2 Atk. 127; *S. C.*, Barnard. Chan. C. 334. See also P. Wms. 336, note to *Slanning v. Style*.

(d) *Hills v. Mills*, 1 Show. 293. See also *In re Willey*, W. N. 1890, in which case Cotton, L. J., intimated an inclination of opinion that the case of *Re Moore*, 21 C. D. 778 (a case appointing a person, in the place of an executor, to perform the duties incident to the office of an executor), went too far, and that the Court could not under the Trustee Act, 1850, appoint a person to discharge duties which belonged only to the office of executor, and not to that of trustee. And see further, Trustee Act, 1893, s. 25 (3). But under sect. 1, sub-sect. 2, of the Judicial Trustees Act, 1896, the administration of the property of a deceased person is a "trust," and the executor is a "trustee," so that under sub-sect. 1 the Court can, in a proper case, remove the executor and appoint a judicial trustee in his place, to whom, under sub-sect. 4, it can give directions as to the administration of the

The consequence of these decisions was, that the Court of Chancery was forced to assume a new jurisdiction (*e*): and that Court restrained an insolvent or bankrupt executor, and appointed a receiver (*f*): and if it was necessary to bring actions at law to recover part of the effects, since that must be in the name of the executor, the Court compelled him to allow his name to be used (*g*).

when the Court of Chancery controlled insolvent executors by the appointment of receivers.

But if a person, *known* by the testator to be a bankrupt or insolvent, be appointed an executor by him, such person cannot, on the ground of insolvency alone, be controlled by the appointment of a receiver (*h*). It is not, however, to be inferred from the circumstance of the Will having been made some time before the commission, and not altered afterwards, that the testator had a deliberate intention to entrust the management of his estate to an insolvent executor (*i*). It must be observed, finally, that the Court will certainly not grant a receiver upon the single ground that the executor is in mean circumstances (*k*).

The general principle upon which the Court will restrain executors and administrators by the appointment of receivers will be pointed out hereafter (*l*).

By sect. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), where a person has died leaving a Will affecting personal estate, and at the time of the death of such person the

Appointment of administrator under 20 & 21 Vict. c. 77, s. 73.

trust: *Re Ratcliff*, [1898] 2 Ch. 352. Moreover, under the Public Trustee Act, 1906, ss. 3, 6, estates may, after probate or grant of administration, be transferred to the Public Trustee for administration.

(*e*) By Lord Mansfield, in *Rex v. Simpson*, 1 W. Black. 458.

(*f*) The Court will restrain the bankrupt executor, but will not appoint a receiver where there is another executor willing to act: *Bowen v. Phillips*, [1897] 1 Ch. 174.

(*g*) *Utterson v. Mair*, 2 Ves. jun. 95; *Scott v. Becher*, 4 Price, 346. In like manner it restrained the assignees of a bankrupt executor from paying over the fund to him, and this upon petition in the bankruptcy, from the peculiar authority it had over them: *Ibid*. Possibly now, however, since the fusion by the Judicature Act of all the Courts into one, the Probate Division would refuse to grant probate in any case where Equity would restrain the executor (if probate were granted to him) and appoint a receiver. See *In the goods of Gunn*, 9 P. D. 242. As to the disability in former times of persons excommunicated, Roman Catholics, persons denying the Trinity, &c., and persons not qualifying for office, see the earlier Editions of this Work, Pt. I. Bk. III. Ch. I.

(*h*) *Gladdon v. Stoneman*, 21st March, 1808, *coram* Lord Eldon, C., reported in a note to 1 Madd. 143; *Langley v. Hawke*, 5 Madd. 46; *Stanton v. The Carron Company*, 18 Beav. 146, 161.

(*i*) *Langley v. Hawke*, 5 Madd. 46.

(*k*) *Hathornthwaite v. Russell*, 2 Atk. 126; *S. C.*, Barnard. Chanc. Cas. 334; *Anon.*, 12 Ves. 4; *Howard v. Papera*, 1 Madd. 142.

(*l*) *Post*, Pt. v. Bk. II. Ch. II.

executor shall be resident out of the United Kingdom, and it shall appear to the Court necessary or convenient by reason of the insolvency of the estate or other special circumstances, the Court may appoint some other person to be administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.

Non compos.

By our law, as well as by the civil law, idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of the trust or not (*m*).

Therefore it has been agreed, that if an executor become *non compos*, the Court may, on account of this natural disability, commit administration to another (*n*); and where one of several executors who have taken probate becomes incapable, the former grant will be revoked and a fresh grant issued to the other executors, power being reserved to the executor who has become incapable to come in and prove when again capable (*o*).

(*m*) Godolph. Pt. 2, c. 6, s. 2; Bac. Abr. Exors. (A.) 5; 2 Robert. 133, 134.

(*n*) *Hills v. Mills*, 1 Salk. 36; *Evans v. Tyler*, 2 Robert. 128, 134. See *post*, Pt. I. Bk. V. Ch. III. § VI.

(*o*) *In the estate of Shaw*, [1905] P. 92.

CHAPTER THE SECOND.

THE APPOINTMENT OF EXECUTORS—BY WHAT WORDS EXECUTORS
MAY BE APPOINTED.

AN Executor can derive his office from a testamentary appointment only (a).

His appointment may either be express, or constructive; in which case he is usually called executor *according to the tenor*; for, although no executor be expressly nominated in the Will by the word executor, yet, if by any word or circumlocution the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors (b).

Executor
according to
the tenor :

As if he declare by his Will that A. B. shall have his goods after his death to “pay his debts, and otherwise to dispose at his pleasure,” or to that effect, by this A. B. is made executor (c). So if the testator say, “I commit all my goods to the administration of A. B.” (d), or, to “the disposition of A. B.” (e); in this case he is made executor. And where certain persons were directed by the Will to pay debts, funeral charges, and the expenses of proving the Will, they were held to be clearly executors according to the tenor (f). So where the testator in

by words
pointing at
the office or
rights of an
executor :

(a) A Will (says the author of the Office of Executor, p. 3, 14th edit.) is the only bed where an executor can be begotten or conceived. According to the old doctrine, an executor could not be primarily appointed in a codicil. See *ante*, p. 156, n. (d).

(b) Swinb. Pt. 4, s. 4, pl. 3; Godolph. Pt. 2, c. 5, s. 2; Wentw. Off. Ex. 20, 14th edit.; *In the goods of Manly*, 3 Sw. & Tr. 56.

(c) *Ibid.*; *Henfrey v. Henfrey*, 4 Moore, P. C. C. 33. So where one said on his death-bed to his wife that she *should pay all and take all*, by this she was executrix: *Brightman v. Keighley*, Cro. Eliz. 43.

(d) Godolph. Pt. 2, c. 5, s. 3; Bro. Executors, pl. 73.

(e) *Pemberton v. Cony*, Cro. Eliz. 164; Godolph. Pt. 2, c. 5, s. 3. So if he says, “I will that A. B. shall dispose of my goods which are in his custody,” he is thereby made executor of those parcels or goods: *Ibid.*

(f) *In the goods of Fry*, 1 Hagg. 80. See also *In the goods of Almosnino*, 1 Sw. & Tr. 508; *In the goods of Collett*, Dea. & Sw. 274; *In the goods of Baylis*, L. R. 1 P. & D. 21; *In the goods of Adamson*,

a codicil said, "I appoint my nephew my residuary legatee, to discharge all lawful demands against my Will," the nephew was admitted executor (*g*). So if the testator say, "I make A. B. lord of all my goods" (*h*), or "I make my wife lady of all my goods" (*i*), or "I leave all my goods to A. B." (*k*), or "I leave A. B. legatary of all my goods" (*l*), or "I leave the residue of all my goods to A. B." (*m*), it will amount to the appointment of such persons respectively as executors according to the tenor (*n*). And where by his Will a testator said, "I appoint A. B. and C. D.," but did not state in what capacity he appointed them: and also bequeathed legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to it, the Court held that by the words of the Will A. B. and C. D. were appointed executors (*o*). Again, where a testator did not specifically appoint any executor, but nominated four persons to act as his trustees, and bequeathed to them his residuary estate, with power to receive any sums due to the residue, and to give a discharge for the same, and in the Will gave directions to his "executors," using the terms "trustees" and "executors" indifferently, as referring to the same persons, it was held that the trustees were executors according to the tenor, and entitled to probate (*p*). So where a soldier's Will consisted of a letter giving the addressee full liberty to deal with his affairs, and

L. R. 3 P. & D. 253; *In the goods of Bell*, 4 P. D. 85; *In the goods of Lush*, 13 P. D. 20.

(*g*) *Grant v. Leslie*, 3 Phillim. 116.

(*h*) Godolph. Pt. 2, c. 5, s. 3; Swinb. Pt. 4, s. 4, pl. 3.

(*i*) Swinb. Pt. 4, s. 4, pl. 3.

(*k*) Godolph. Pt. 2, c. 5, s. 3; Swinb. Pt. 4, s. 4, pl. 3.

(*l*) *Ibid.*

(*m*) *Ibid.* "I devise all my personal goods to my two daughters and my wife, whom I make executrix"; this was holden to appoint them all three executrices: *Foxwith v. Tremaine*, Ventr. 102. So where a Will contained a clause to the effect "I appoint my sister A. B. my executrix, only requesting that my nephews C. D. and E. F. will kindly act for and with this dear sister." C. D. and E. F. were held to be executors according to the tenor: *In the goods of Brown*, 2 P. D. 110. See *Powell v. Stratford*, referred to 3 Phillim. at p. 118.

(*n*) In *Androvin v. Poilblanc*, 3 Atk. 301, Lord Hardwicke said, a person named "universal heir," in a Will, would have a right to go to the Ecclesiastical Court for the probate. But it has been held otherwise as to a person named universal legatee: *In the goods of Oliphant*, 1 Sw. & Tr. 525; *In the goods of Pryse*, [1904] P. 301.

(*o*) *In the goods of Bradley*, 8 P. D. 215.

(*p*) *In the goods of Leven*, 15 P. D. 22; *In the goods of Wilkinson*, [1892] P. 227; *In the goods of Russell*, *ib.* 380.

giving directions as to the disposal of his property, the addressee was held entitled to probate of the document as executor according to the tenor (q).

It appears that the practice of the Prerogative Court was to grant administration with the Will annexed to the universal legatee of a testamentary paper, and not to decree probate to him as executor according to the tenor. Sir C. Cresswell adhered to this practice (r). In *In the goods of Pryse* (s), a universal legatee and devisee of a testamentary paper in which no executor was named applied for a grant of probate as executor according to the tenor, and it was held by Sir F. H. Jeune, P., whose decision was affirmed by the Court of Appeal, that the applicant was entitled to administration with the Will annexed, but not to probate, and that the practice of the Probate Court hitherto prevailing in this respect had not been altered by the Land Transfer Act, 1897. The President of the Probate Division informed the Court of Appeal that the practice was still that which had been in force for so very many years, and that to alter the practice would make considerable trouble and confusion in the office.

Practice to grant administration with Will annexed, and not probate, to universal legatee.

Where the testator gave divers legacies, and then appointed that, his debts and legacies being paid, his wife should have the residue of his goods, so that she put in security for the performance of his Will, this was held by three common law judges to make her executrix (t). Again, where the Will said nothing of the testator's debts, but contained only devises of real and personal legacies, to be paid within two months after his death, and concluded, without any bequest of the residue or express appointment of executors, in these words, "I appoint A. B., C. D., and E. F., to receive and pay the contents above mentioned;" Sir G. Lee held that the persons so named were executors according to the tenor; for they could not receive and pay the legacies without collecting in the effects; and no one

Other instances of executors according to the tenor.

(q) *Re Stanley*, [1916] P. 192.

(r) *In the goods of Oliphant*, 1 Sw. & Tr. 525; and see post, Pt. I. Bk. v. Ch. III. § 1.

(s) [1904] P. 301.

(t) Wentw. Off. Ex. p. 20, 14th edit. But if the testator bequeath the residue of his goods *the debts discharged*, in this case, according to Swinburne, the universal legatary doth still remain legatary, and is to receive his legacy at the hands of the executor or administrator: Swinb. Pt. 4, s. 4, pl. 7.

can assent to a legacy but he that has the management of the estate, because legacies cannot be paid till after the debts, and he only who has the management of the estate knows whether the assets are sufficient (*u*). So a direction to a person "to pay all my just debts" (*x*) or "to hold and administer in trust my estate" (*y*), will constitute such person executor according to the tenor.

Where persons have been held *not* to be executors according to the tenor:

But where a testator, being entitled to many shares in the Sun Fire Office, and in the mines of Scotland, and a lease for years of a coal-meter's place, gave the same, by a Will containing no appointment of an executor, to trustees in trust for his daughter, and after several contingencies gave the remainder thereof to his son, and if he should die in his minority without issue, gave the remainder thereof to the trustees for their own use, and gave all the residue of his estate to the said trustees, to pay one moiety to his daughter, and the other moiety to his son; Sir G. Lee held that there were no words in this Will that made the trustees executors; inasmuch as they had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of an executor (*z*). So where the whole personal estate was left to a trustee on trust for a specific purpose, and no executor was named in the Will, it was held by Sir C. Cresswell that such trustee was not entitled to probate as executor according to the tenor (*a*).

Unless the Court can gather from the words of the Will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof (*b*). A direction in a Will to a person to pay the

(*u*) *Pickering v. Towers*, 2 Cas. temp. Lee, 401.

(*x*) *In the goods of Cook*, [1902] P. 114; *In the goods of Kirby*, [1902] P. 188.

(*y*) *In the goods of Way*, [1901] P. 345; but see *In the estate of Mackenzie*, [1909] P. 305.

(*z*) *Boddicott v. Dalzell*, 2 Cas. temp. Lee, 294. See also *Fawkener v. Jordan*, *ib.* 327; and *Moss v. Bardwell*, 3 Sw. & Tr. 187, as to the distinction between the offices of trustee and executor.

(*a*) *In the goods of Jones*, 2 Sw. & Tr. 155.

(*b*) *In the goods of Punchard*, L. R. 2 P. & D. 369; *In the goods of Lowry*, L. R. 3 P. & D. 157; *In the goods of Baylis*, L. R. 1 P. & D. 21; *In the goods of Stewart*, L. R. 3 P. & D. 244; *In the estate of Mackenzie*, [1909] P. 305.

testator's debts or funeral expenses out of a particular fund and not out of the general estate, does not constitute such person executor according to the tenor (c).

An executor may be appointed by necessary implication: as where the testator says, "I will that A. B. be my executor, if C. D. will not;" in this case C. D. may be admitted, if he please, into the executorship (d). So where the testator gave a legacy to A. B. and several legacies to other persons, among the rest, to his daughter-in-law, C. D.: immediately after which legacies followed these words; "but should the within-named C. D. be not living, I do constitute and appoint A. B. my whole and sole executrix of this my last Will and Testament, and give her the residue;" probate was decreed to C. D., as executrix by implication, according to the tenor of the Will (e). Or if the testator supposing his child, his brother, or his kinsman to be dead, say in his Will, "Forasmuch as my child, my brother, &c., is dead, I make A. B. my executor," in this case, if the person whom the testator thought dead be alive, he shall be executor (f). So where a man made his last Will, and did will thereby, that none should have any dealings with his goods until his son came to the age of eighteen years, except J. S., by this J. S. was held to be made executor during the minority of his son (g).

There is a great distinction between the office of coadjutor, or overseer, and that of executor. The coadjutor, or overseer, has no power to administer or intermeddle otherwise than to

Executor may be appointed by necessary implication.

What words appoint a coadjutor or overseer:

(c) *In the goods of Davis*, 3 Curt. 748; *In the goods of Toomy*, 3 Sw. & Tr. 562; *In the goods of Fraser*, L. R. 2 P. & D. 183.

(d) Godolph. Pt. 2, c. 5, s. 3; Swinb. Pt. 4, s. 4, pl. 6. If the testator makes A. B. or C. D. his executors, in this case they shall both be executors, for "or" shall be construed, "and": Godolph. Pt. 2, c. 5, s. 3, c. 3, s. 1.

(e) *Naylor v. Stainsby*, 2 Cas. temp. Lee, 54.

(f) Godolph. Pt. 2, c. 5, s. 3; Swinb. Pt. 4, s. 4, pl. 6.

(g) *Brightman v. Keighley*, Cro. Eliz. 43. However, in Godolphin, Pt. 3, c. 3, s. 5, it is laid down that if the testator say, "If my son, A. B., marry with C. D., let him not be my executor," or "one of my 'executors,'" this would not hold; because an "executor may not be instituted, nor the office of executor inferred, only by conjecturals." Where a testatrix executed a Will containing these words: "I leave the sum of one sovereign each to the executor and witness of my Will for their trouble to see that everything is justly divided," but not naming any executor, and beneath the signature of the testatrix, and opposite the names of the attesting witnesses were the words "executors and witnesses," the Court held that there was no appointment of executors: *In the goods of Woods*, L. R. 1 P. & D. 556.

distinction
between his
office and that
of executor.

counsel, persuade, and advise; and if that fail to remedy negligence or miscarrying in the executors, he may complain to the Court, and his charges in so doing ought to be allowed out of the testator's estate (*h*). It is therefore material to inquire what words in a Will amount only to an appointment as coadjutor, or overseer. If A. be made an executor, and B. a coadjutor, without more, he is not by this made a joint executor with A. (*i*). But if A. be made executor, and the testator after, in his Will, expresseth that B. shall administer also with him, and in aid of him, here B. is an executor as well as A., and may prove the Will alone as executor, if A. refuse (*k*). Where an infant was made an executor, and A. and B. *overseers*, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant, by this they were held to be executors in the meantime (*l*).

An executor
by the tenor
may be
admitted to
probate
jointly with
an executor
expressly
nominated.

Although when there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection either in principle or practice, to admit an executor according to the tenor to probate, jointly with an executor expressly nominated. Thus in *Powell v. Stratford* (*m*), the testator's wife was expressly named as executrix; and Lord H. was to assist her, but he was not called executor; the Court said he might be so according to the tenor. So in another case (*n*), the deceased left a Will and four codicils; and in the Will named certain persons executors, and his nephew residuary legatee: in the last codicil, dated at a time when his nephew was on the point of attaining twenty-one years,

(*h*) Wentw. Off. Ex. 2, 14th edit. Sir Thomas Ridley takes occasion to wish that overseers might be made of more use; although, he says, they be looked upon only as candle-holders; having no power to do anything but hold the candle, while the executors tell the deceased's money: Ridley, Pt. 4, c. 2; 4 Burn, E. Law, 126, 8th edit.

(*i*) Bro. Executors, pl. 73; Wentw. Off. Ex. 21, 14th edit.; Godolph. Pt. 2, c. 2, s. 4. The words in the year-book, 21 Hen. VI. 6, are, "I will that A. and B. shall be my executors, and also that I. and K. be coadjutors of the same A. and B. to distribute my goods."

(*k*) Bro. Executors, pl. 73; Wentw. Off. Ex. 21, 14th edit. Where a testator willed that A. and B. should be his executors, and that I. and K. should be the executors of A. and B. to dispose of his goods, they are all executors: Dyer, 4, pl. 10, in marg.

(*l*) Wentw. Off. Ex. 21, 14th ed.

(*m*) 3 Phillim. 118; *In the goods of Brown*, 2 P. D. 110.

(*n*) *Grant v. Leslie*, 3 Phillim. 116.

the words were, "I appoint my nephew my residuary legatee to discharge all lawful demands against my Will and codicils signed of different dates:" It was held that the nephew should be joined in the probate. And in a subsequent case, where an executor was expressly nominated for general purposes, another person was held to be executor, according to the tenor, for limited purposes (*o*).

Again, in a case where a person had been expressly appointed executor for a limited purpose in a Will, it was held, that he was appointed general executor by a codicil, by implication merely, without express words (*p*).

A general appointment by implication after an express limited one.

In another case, where a person by his Will directed that the legatees should appoint two persons to execute his testamentary bequests, probate was granted in the Prerogative Court to the nominees as executors; and on that occasion the Deputy Registrar informed the Court that, in practice, instances had frequently occurred of granting probates to persons nominated by those authorized by the testator so to nominate (*q*). And it has been held, that the Wills Act does not preclude this practice (*r*).

Appointee of legatees.

An executor may be appointed solely, or in conjunction with others: but in the latter case they are all considered in law in the light of an individual person (*s*). Likewise a testator may appoint several persons as executors in several degrees: as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on (*t*). In which case the wife is said to be *instituted* executor

Several executors:

and in several degrees.

Substituted executors.

(*o*) *Lynch v. Bellew*, 3 Phillim. 424.

(*p*) *In the goods of Aird*, 1 Hagg. 336.

(*q*) *In the goods of Cringan*, 1 Hagg. 548. The testator in this case died in Scotland; and Sir John Nicholl said he was informed that such a provision, as to the appointment of executors, is not very unusual in that country. See *In the goods of Ryder*, 2 Sw. & Tr. 127, where the person authorized to nominate had nominated himself, and probate was granted to him; but cf. *Re Sampson*, [1906] 1 Ch. 435.

(*r*) See *post*, p. 167, note (*b*).

(*s*) Toller, 37. See *post*, Pt. III. Bk. I. Ch. II.

(*t*) Swinb. Pt. 4, s. 19, pl. 1; Godolph. Pt. 2, c. 4, s. 1. So where a testator appointed his son sole executor, but in the event of his going abroad, or being or remaining abroad for upwards of two calendar months, then he appointed B. his executor, and the son after the death of the testator went abroad without taking probate and there remained, Sir J. P. Wilde granted probate to B., but reserved power to the son to prove the Will: *In the goods of Lane*, 33 L. J. P. M. & A. 185.

If instituted executor accepts office and dies intestate the substitutes are all excluded :

unless testator otherwise expressly provides.

in the first degree, B. is said to be *substituted* in the second degree, C. to be *substituted* in the third degree, and so on (*u*). It must be observed, that if an instituted executor once accepts the office, and afterwards dies intestate, the substitutes, in what degree soever, are all excluded; because the condition of law, (if he will not or cannot be executor,) was once accomplished by such acceptance of the instituted executor (*x*). But where a testator appoints an executor, and provides that *in case of his death*, another should be substituted; on the death of the original executor, although he has proved the Will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime, or afterwards (*y*). In *In the goods of Foster* (*z*) the deceased appointed his wife sole executrix, and in default of her he appointed two nephews executors, and Lord Penzance held that on the death of the wife, who had taken probate, the two nephews were entitled to a grant of probate as substituted executors. His Lordship in his judgment said it was a question of construction as to what the testator meant and whether the substitution was to take place only in the event of the wife not acting at all, or as had happened, in the

(*u*) The substituted executor cannot propound the Will, till the person first named executor has been cited to accept or refuse the office: *Smith v. Crofts*, 2 Cas. temp. Lee, 557. But where a testatrix appointed her nephew Charles her executor, "but in case he shall happen at the time of my decease to be abroad, or from any other cause incapable of acting as such executor, then and in such case I appoint my nephew Eardley executor, to act only during such time as the said Charles shall be resident abroad, or otherwise incapable of acting," and the nephew Charles died in the lifetime of the testatrix, probate was granted by Sir John Dodson to the nephew Eardley, as executor: *In the goods of Wilmot*, 2 Robert. 579; *In the goods of Langford*, L. R. 1 P. & D. 458. In that case an appointment of A. as executor, and "in case of his absence on foreign duty," of B. as executrix, was held to be an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the Will arose; A. was in England at the time of the testator's death, but was absent on foreign service in her Majesty's navy, when the application for probate was made, and was likely to be absent for some years; probate was granted to B.

(*x*) Swinb. Pt. 4, s. 19, pl. 10; Godolph. Pt. 2, c. 4, s. 2.

(*y*) *In the goods of Lighton*, 1 Hagg. 235; *In the goods of Johnson*, 1 Sw. & Tr. 17. So he may be admitted if the intention is that the substituted executor shall be executor, if the original executor cannot or will not act, and the latter dies in the testator's lifetime: *In the goods of Betts*, 30 L. J. P. M. & A. 167.

(*z*) L. R. 2 P. & D. 304.

case of her death after taking probate, that the Court would not construe the words in a technical spirit, but would endeavour rather to carry out the real object of the testator; and that he thought it reasonable to hold that the testator intended that his wife should administer as long as she could, and that in the event of her death, either before or after taking probate, he substituted other persons; and his Lordship made the grant to the two nephews accordingly.

Where a testatrix appointed A. and B. executors of her last Will, and "in case of the death of either of them," empowered the survivor to appoint another, "so that there should continue to be two executors:" Upon the death of A., B. appointed C. executor to act with him: C. did not take probate during the lifetime of B.: And it was held by Sir H. Jenner Fust, that probate might pass to C., and that he might appoint another executor to act with him (a). So that where a testator bequeathed his estate in trust to F. and G., who were nominated executors, with directions conjointly with the testator's wife to appoint a third person as trustee and executor, it was held by Sir H. Jenner Fust that, though there was no probability of agreement between F. and G., and the testator's wife, in the choice of such third person, the appointment of executors was not thereby void, but that F. and G. were entitled to probate, with a power reserved for the third person when appointed (b).

Several executors with power to survivor to appoint a fresh one.

Where the testator in his Will appointed two persons his executors, and in a codicil named his wife "sole executrix of this my Will," the Court held that the appointment of executors in the Will was revoked (c).

Appointment of executors, in a Will revoked by codicil naming a "sole executor":

(a) *In the goods of Deichman*, 3 Curt. 123.

(b) *Jackson v. Paulet*, 2 Robert. 344. It was objected that, under the Wills Act, probate could be decreed only to a person named in a duly executed testamentary paper. But the Court said, the case was not like one where a testator, in his Will, reserves to himself a power to deal hereafter with his Will by writings not duly executed. See *ante*, p. 74.

(c) *In the goods of Lowe*, 3 Sw. & Tr. 478. But a reappointment in a subsequent Will of one of the executors named in a former Will with a new co-executor is no revocation of the appointment of executors in the first Will: *In the goods of Leese*, 31 L. J. P. M. & A. 169. Where, however, in a similar case, the word "sole" was used in a subsequent Will, the first appointment was held to be revoked: *In the goods of Baily*, L. R. 1 P. & D. 628.

appointment
bad for un-
certainty.

An appointment of "A. as my executor with any two of my sons," was held bad, as to the sons, for uncertainty (d).

(d) *In the goods of Baylis*, 2 Sw. & Tr. 613. Where a testator, having three sisters living when he made his Will, appointed "one of my sisters" sole executrix, and two of the sisters died in his lifetime, Sir J. Hannen held that the appointment was void from uncertainty: *In the goods of Blackwell*, 2 P. D. 72. As to the admission of parol evidence to correct an imperfect description of the executor contained in a Will, see *In the goods of De Rosaz*, 2 P. D. 66; *In the goods of Brake*, 6 P. D. 217; *In the goods of John Chappell*, [1894] P. 95; and for a case of misdescription of an executor corrected by striking out the wrong surname, see *In the goods of Cooper*, [1899] P. 193.

CHAPTER THE THIRD.

IN WHAT WAYS THE APPOINTMENT OF EXECUTOR MAY BE QUALIFIED.

THE appointment of an executor may be either absolute or qualified. It may be absolute, when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time (*a*). It may be qualified, by limitations as to the time or place wherein, or the subject-matter whereon, the office is to be exercised: or the creation of the office may be conditional.

It may be qualified by limitations in point of time, inasmuch as the time may be limited when the person appointed shall begin, or when he shall cease, to be executor. Thus if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death (*b*), or at an uncertain time, as upon the death or marriage of his son (*c*), this is a good appointment. Where the deceased appointed two executors, and, in case of the death of either of them, appointed two others to be executors in their stead; on the death of the original executor who had alone proved the Will, the substituted executors were admitted to the office (*d*). So if a man appoints his son to be executor when he shall come to full age (*e*), such qualified appointment is good: and in the meantime he has no executor. Again, the testator may appoint the executor of A. to be his executor: and then if he die before A. he has no executor till A. die (*f*). So a man may make A. and B. his executors, and appoint that A. shall not intermeddle during the

Appointment
of executor:
absolute:
qualified.

1. Limita-
tions in point
of time:
as to when
the executor
shall begin
to execute
his office:

(*a*) Toller, 36.

(*b*) Swinb. Pt. 4, s. 17, pl. 1; Wentw. Off. Ex. 22, 14th edit.

(*c*) Swinb. Pt. 4, s. 17, pl. 4.

(*d*) *In the goods of Lighton*, 1 Hagg. 235: A proxy of consent was exhibited from the original executor who had not proved. See also accord. *In the goods of Johnson*, 1 Sw. & Tr. 17.

(*e*) Wentw. Off. Ex. 22, 23, 14th edit.

(*f*) Wentw. Off. Ex. 22, 23, 14th edit.; Godolph. Pt. 2, c. 2, s. 4.

as to when he shall cease :

life of B., and by this they shall be executors successively, and not jointly (*g*). Likewise the testator may appoint a person to be his executor for a particular period of time only, as during five years next after his decease (*h*), or during the minority of his son, or the widowhood of his wife (*i*), or until the death or marriage of his son (*k*). In a case (*l*) where a widow was appointed executrix and residuary legatee for life, with remainder, as to the residue, to the nieces of the testator, and by a codicil it was provided, that, in case she thought proper to marry again, she and the nieces should agree on proper persons to be trustees, to whom she was directed to assign all the real and personal estate, in trust for the uses of the Will, but so as not to be liable to the debts, or subject to the power, of her second husband, it was held that her executorship expired on her second marriage.

in these cases an administrator may be appointed till there be an executor, or after the executorship is ended.

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other, the Court may commit administration to another person, until there be an executor, or after the executorship is ended (*m*).

2. Limitations in point of place.

In like manner, the appointment may be limited in point of place: as thus, the testator may make A. his executor for his goods in Cornwall, B. for those in Devon, and C. for those in Somerset (*n*): or he may make different executors for his goods in different dioceses, or different provinces (*o*): or, which seems more rational and expedient, he may so divide the duty when his property is in various countries (*p*).

(*g*) Wentw. Off. Ex. 31, 14th edit.; Bro. Executors, 155.

(*h*) Swinb. Pt. 4, s. 17, pl. 1.

(*i*) Wentw. Off. Ex. 29, 14th edit.; Godolph. Pt. 2, c. 2, s. 3.

(*k*) Swinb. Pt. 4, s. 17, pl. 4.

(*l*) *Bond v. Faikney*, 2 Cas. temp. Lee, 371.

(*m*) Swinb. Pt. 4, s. 17, pl. 2; Plowd. 279, 281. This will be an administration *cum testamento annexo*, and the person entitled to it will be discovered by referring to the rules respecting that species of administration. See *post*, Pt. I. Bk. v. Ch. III. § 1.

(*n*) Swinb. Pt. 4, s. 18, pl. 1; Godolph. Pt. 2, c. 2, s. 3; Wentw. Off. Ex. 29, 14th edit.; *Spratt v. Harris*, 4 Hagg. 408, 409.

(*o*) Swinb. Pt. 4, s. 18, pl. 4.

(*p*) *Spratt v. Harris*, Toller, 36; 4 Hagg. 408, 489. Where a testator appointed a man who was resident in Portugal, to be his executor "in Portugal," it was held that the words "in Portugal" were equivalent to "for Portugal," and that such executor was not entitled to probate in this country: *Velho v. Leite*, 3 Sw. & Tr. 456. Again, where W. made a Will in England in 1861, and appointed B. and O.

Again, the power of an executor may be limited as to the subject-matter upon which it is to be exercised. Thus the testator may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for his debts due to him (*q*). So a person may be made executor for one particular thing only, as touching such a statute or bond, and no more (*r*). And the same Will may contain the appointment of one executor for general, and another for limited purposes (*s*). In *Re Parker's Trusts* (*t*) a testator, who was sole surviving trustee of a Will, by his Will appointed general executors and also separate special executors for the purpose of executing, in continuation to himself, the trusts of the Will of the original testator. The general executors first obtained probate of the Will of their testator, and subsequently further probate limited to the trust estates of the original testator was granted to one of the special executors of the deceased trustee for the purpose only of executing in con-

3. Limitations as to the subject-matter:

but under the Trustee Act, 1893, a sole surviving trustee is not entitled to appoint a special executor for the purpose of acting as trustee for the Will of the original testator.

executors thereof, and in May, 1863, being in India, he made a codicil, and on the 9th of June executed a paper, whereby he appointed E. & F. "my executors in this country." The Court held that the context of the paper, giving the testator's reasons for the appointment of E. and F., showed that he did not mean them to have any power over his property in England, and granted probate to B. and C. without reserving power to E. and F.: *In the goods of Wallich*, 3 Sw. & Tr. 423. If power had been reserved of making a similar grant to them, this, it would seem, would not affect the validity of the probate: *In the goods of Pulman*, 3 Sw. & Tr. 269. But where a testator executed two Wills, one disposing of property in Tasmania, and appointing executors resident in Tasmania; the other disposing of property in England, and appointing three executors distinct from those appointed in the other Will, the Court granted probate to issue of both Wills as together containing the Will of the testator: *In the goods of Harris*, L. R. 2 P. & D. 83. See *Re Cohen's Executors*, [1902] 1 Ch. 187.

(*q*) Dyer, 4, *a*. Wentw. Off. Ex. 29, 14th edit. Godolph. Pt. 2, c. 3, pl. 2, 3.

(*r*) Wentw. Off. Ex. 29, 14th edit.; *Davies v. Queen's Proctor*, 2 Robert. 413. But when the testator said, "I make my wife my full and whole executrix of all my cattle, corn, and movable goods," and said nothing of what should be done with the residue of his estate, as leases and debts, Jones and Croke, JJ., held that she was sole and absolute executrix for the whole estate, as well leases and debts as other things: but Berkeley, J., thought that she was a special executrix for the things named, and not a general executrix: *Rose v. Bartlett*, Cro. Car. 293. Where a testator by his Will gave several specific legacies, but did not dispose of the residue of his personal estate, and appointed his daughter executrix of all property not named in his Will, the Court refused to grant probate of the Will to the daughter as executrix thereof: *In the goods of Wakeham*, L. R. 2 P. & D. 395.

(*s*) *Lynch v. Bellew*, 3 Phillim. 424.

(*t*) [1894] 1 Ch. 707. See *Re Boucherett*, [1908] 1 Ch. 180.

tinuation to the deceased trustee the trusts of the Will of the original testator, and it was held by Kekewich, J., that sect. 31 of the Conveyancing Act, 1881 (now replaced by sect. 10 of the Trustee Act, 1893), did not enable a sole surviving trustee of a Will to appoint by his Will special executors for the purpose of acting, in continuation to himself, as trustees of the Will of the original testator, and Kekewich, J., directed the special executor who had obtained such limited probate to execute a transfer of the personal estate which had become vested in him as such special executor to new trustees who had been appointed by the general executors under the statutory power.

Separate executors may all be sued as one executor.

But although a testator may appoint separate executors of distinct parts of his property, and may divide their authority, yet *quoad* creditors, they are all to be considered as one executor, and may be sued as one executor (*u*).

4. The appointment may be conditional.

Lastly, the appointment may be conditional; and the condition may be either precedent or subsequent (*x*). Thus it may be, that he give security to pay the legacies, and in general to perform the Will before he acts as executor (*y*). In *Alice Francis' case* (*z*), the testator willed, that if his wife suffered J. S. to enjoy Blackacre for three years, then she should be his executrix; but if she disturbed J. S., then he made his son executor: It was held in C. B. by all the Justices (The Lord Anderson at first *dissentiente*) that she was executrix presently; for this should not be construed a condition precedent, but as a condition to abridge her power to be executrix, if she perform it not.

In a case where an executor was appointed, provided he proved the Will within three calendar months next after the

(*u*) *Rose v. Bartlett*, Cro. Car. 293.

(*x*) Wentw. Off. Ex. 23, 14th edit.; Godolph. Pt. 2, c. 2, s. 1. Should the executorship be determined by a breach of the condition, yet all acts done by the executor in pursuance of his office, before such condition broken, are good: Godolph. Pt. 2, c. 2, s. 1. See *post*, Pt. I. Bk. VI. Ch. III.

(*y*) Godolph. Pt. 2, c. 2, s. 1; Wentw. Off. Ex. 28, 14th edit. Where A. made B. and C. executors, and added, "I will that C. shall pay my other executor all such debts as he owes me, before he meddle with anything of this my Will, or take any advantage of this my Will for the discharge of the same debts, for that I have made him one of my executors," it was held that C. could not administer, or be executor, before he paid the debts: *Stapleton v. Truelock*, 3 Leon. 2, pl. 6.

(*z*) Dyer, 4, pl. 8, in margin; Wentw. Off. Ex. 28, 14th edit.

death of the deceased, it was held, that, in computing the time, the day of the death was to be excluded (a). But if he fails to prove the Will within three months, his appointment is void (at all events if there be substituted executors), though the failure were through the inadvertence of his solicitor, and though he has acted in the execution of the trust of the Will (b).

It is not thought expedient to go further into the law of conditional appointments of executors, which the reader will find fully discussed in Swinburne (c) and Godolphin (d). The parts of the subjects which seem necessary to be introduced into this Treatise will be found subsequently, when conditional legacies are considered (e).

(a) *In the goods of Wilmot*, 1 Curt. 1.

(b) *In the goods of Day*, 7 Notes of Cas. 553. See also *In the goods of Lane*, 33 L. J. P. M. & A. 185, ante, p. 165, note (t).

(c) Pt. 4, ss. 5—16.

(d) Pt. 1, cc. 13, 14; Pt. 2, c. 2.

(e) *Post*, Pt. III. Bk. III. Ch. II. § VI.

CHAPTER THE FOURTH.

IN WHAT CASES THE APPOINTED EXECUTOR MAY TRANSMIT HIS APPOINTMENT.

ALTHOUGH the executor cannot assign the executorship (*a*), yet the interest vested in him by the Will of the deceased may, generally speaking, be continued and kept alive by the Will of the executor; so that if there be a *sole* executor of A., the executor of such executor is, to all intents and purposes, the executor and representative of the first testator (*b*). But if the first executor dies intestate, then his administrator is not such a representative, but an administrator *de bonis non* of the original testator must be appointed by the Court (*c*); for the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator: But the administrator of the executor is merely the officer of the Court of Probate and has no privity or relation to the original testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator (*d*). However,

1. Where there is a sole executor, his executor represents the first testator:

but his administrator does not:

(*a*) *Bedell v. Constable*, Vaugh. 182.

(*b*) Com. Dig. tit. Administration (G) tit. Administration (B. 6); Touchst. 464; stat. 25 Edw. III. st. 5, c. 5; Wentw. Off. Ex. 461, 14th edit.; 2 Black. Comm. 506. The rule is the same, though the original probate was a limited one: *In the goods of Beer*, 2 Robert. 349. See *post*, Pt. III. Bk. I. Ch. III., as to whether a power given to an executor is transmissible to his executor.

(*c*) Bro. Abr. Administrator, pl. 7; Com. Dig. Administrator (B. 6); 2 Black. Comm. 506. See *In the goods of Martin*, 3 Sw. & Tr. 1; *In the goods of Bridger*, 4 P. D. 77. Thus it was held that the administratrix of an executrix could not sue for the double value of lands held over, after notice to quit under a demise from the testator, contrary to stat. 4 Geo. II. c. 28, without taking out administration *de bonis non*, even though the tenant had attorned to her: *Tingrey v. Brown*, 1 Bos. & Pull. 310.

(*d*) 2 Black. Comm. 506.

the administrator *durante minore ætate* of the executor of an executor is the representative of the first testator; for such an administrator is *loco Executoris* (e). So also if administration *cum testamento annexo* has been granted under letter of attorney for the use or benefit of another, it is the same thing as if the latter had proved the Will himself (f). And the grant to the attorney of an executor does not break the chain of representation (g).

If the first executor should die, without having proved the Will, the executorship is not transmissible to his executor, but is wholly determined, and an administrator *cum testamento annexo* must be appointed (h). Hence it follows that if the person appointed executor dies before the testator there must be administration *cum testamento annexo* (i).

A married woman, being executrix, might, even before the Married Women's Property Act, continue the chain of representation, by making her own executor (k).

In *Barr v. Carter* (l), Elizabeth Chapman, a married woman, made a Will, merely executing a power given her by the marriage settlement, but she also went on to appoint Elizabeth Carter sole executrix of that her Will: She died in the lifetime of her husband; and the Ecclesiastical Court granted probate of this Will in the general form: the testatrix was herself the executrix of a former husband, Thomas Hawley: And it was held that the general probate of her Will transmitted the representation to Elizabeth Carter, so as to make her the personal representative of the first testator, Thomas Hawley (m).

the executor of the executor does not represent the first testator, unless the first executor proves the Will.

Transmission of executorship by a feme covert executrix.

(e) *Anon.*, 1 Freem. 287; *contra*, *Limmer v. Every*, Cro. Eliz. 211, as cited by C. B. Gilbert, in Bac. Abr. Executors (B. 8). But see Mr. Smirke's note, in his valuable edition of Freeman.

(f) *In the goods of Bayard*, 1 Robert. 769; *S. C.*, 7 Notes of Cas. 117.

(g) *In the goods of Murguia*, 9 P. D. 236.

(h) *Isted v. Stanley*, Dyer, 372 a; *Hayton v. Wolfe*, Cro. Jac. 614; Wentw. Off. Ex. 82, 14th edit.; *Day v. Chatfield*, 1 Vern. 200; *Wankford v. Wankford*, 1 Salk. 308; *Anon.*, 3 Salk. 21.

(i) *Brown v. Poyns*, Sty. 147; *Pullen v. Sergeant*, 2 Chan. Rep. 300.

(k) *Birkett v. Vandercom*, 3 Hagg. 750; *ante*, p. 39.

(l) 2 Cox, 429.

(m) But a limited probate will not continue the chain of representation: *In the goods of Bayne*, 1 Sw. & Tr. 132. The practice of granting limited probate in the case of Wills of married women has since the Married Women's Property Act, 1882, been altered, and probate in the general form will now be granted (see *ante*, p. 46), and it would seem, that in such case, the representation would be unbroken.

If there are several executors, no interest is transmissible, except to the executor of the survivor:

If there are several executors appointed, and one of them dies, leaving one or more of his co-executors living, no interest in the executorship is transmissible to his own executor, but the whole representation survives, and will be transmitted ultimately to the executor of the surviving executor, unless he dies intestate. Thus, if A. makes B. and C. executors, then B. makes J. S. executor and dies, and afterwards C. dies intestate, the executor of B. shall not be executor of A., because the executorship wholly and solely vested in C. by the survivorship; and so administration *de bonis non* shall be committed (n).

effect of renunciation by some of several executors:

The law was formerly the same where there were several executors, and one alone proved the Will, and the rest renounced before the Ordinary; there, upon the death of him who proved, no interest was transmitted to his executor, if any of those who refused were surviving (o). But the law is altered in this respect by the Court of Probate Act, 1857, s. 79.(p).

effect of power to prove being reserved.

In *In the goods of Reid* (q) probate of a Will was granted to one of two executors, power being reserved to make the like grant to the other executor. The acting executor died, not having fully administered; at the date of his death the other executor had not been heard of for fourteen years and the daughter and sole next of kin of the testator, with the assent of the executors of the acting executor, moved for a grant to herself of letters of administration *de bonis non*: It was held that the grant could not be made, as, upon the non-appearance to a citation of the executor to whom power to prove had been reserved, the chain of executorship would be continued in the executors of the acting executor without any fresh grant from the Court. Leave was given to effect service of the citation on the absent executor by advertisement.

A grant for the use and benefit of an executor during his incapacity is equivalent to a grant of probate to him, and, should such executor survive his co-executor, the executor of the latter will not represent the original testator (r).

(n) Wentw. Off. Ex. 215, 14th edit.; *In the goods of Smith*, 3 Curt. 31.

(o) *Arnold v. Blencowe*, 1 Cox, 426.

(p) See *post*, Ch. vi. § II.

(q) [1896] P. 129; *post*, p. 192, n. (i).

(r) *In the goods of Frengley*, [1915] 2 Ir. R. 1.

CHAPTER THE FIFTH.

EXECUTOR DE SON TORT.

HAVING thus considered the appointment of executors by legal means, it remains to treat of a class who are in some sort regarded as executors, but who assume the office by their own intrusion and interference.

If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law, an executor of his own wrong, or more usually, an executor *de son tort* (*a*). An executor
de son tort.

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*. Thus it is said in Dyer, *in margine* (*b*), that milking the cows, even by the widow of the deceased, or taking a dog, will constitute an executorship *de son tort*. So in one case the taking a Bible, and in another a bedstead (*c*), were held sufficient, inasmuch as they were the *indicia* of the person so interfering being the representative of the deceased (*d*). So if a man kills the cattle (*e*), or uses or gives away, or sells any of the goods (*f*), or if he takes the goods What acts
constitute an
executor *de*
son tort.

(*a*) The definition of an executor *de son tort*, by Swinburne, Godolphin, and Wentworth, is in the same words, viz., "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the [Ecclesiastical] Court to administer": Swinb. Pt. 4, s. 23, pl. 1; Godolph. Pt. 2, c. 8, s. 1; Wentw. Off. Ex. c. 14, p. 320, 14th edit. But the term is, in the other books, sometimes applied to a lawful executor, who mal-administers; as by the Lord Dyer, in *Stokes v. Porter*, Dyer, 167, *a*.

(*b*) P. 166, *b*.

(*c*) *Robin's Case*, Noy, 69.

(*d*) Toller, 38.

(*e*) Godolph. Pt. 2, c. 8, s. 4.

(*f*) *Read's Case*, 5 Co. 33, *b*; *Padget v. Priest*, 2 Term Rep. 97; Godolph. Pt. 2, c. 1, s. 1; Swinb. Pt. 4, s. 23. So if he gives them away to the poor: Dyer, 166, *b*, in margin.

to satisfy his own debt or legacy (*g*): or if the wife of the deceased takes more apparel than she is entitled to, she will become executrix *de son tort* (*h*). So there may be a *tort* executor of a term for years: as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate (*i*): though with respect to a term of years in reversion there can be no executorship of this nature, because it is incapable of entry (*k*). And it has been said that if he that has from the ordinary letters *ad colligendum*, sell or dispose of any goods, though otherwise subject to perishing, it makes him executor of his own wrong; even though, by the letters *ad colligendum*, he be warranted thereunto; for the judge himself may not do so (*l*), but it is quite clear that the Court in recent years has been in the habit of giving express power to sell property (*m*).

Again, if a man demands the debts of the deceased, or makes acquittances for them, or receives them (*n*), he will become executor *de son tort*. In the case of *Padget v. Priest* (*o*), it was held, that if a man's servant sells the goods of the deceased, as well after his death as before, by the directions of the deceased given in his lifetime, and pays the money, arising therefrom, into the hands of his master, this makes the master, as well as the servant, executor *de son tort*.

(*g*) Godolph. Pt. 2, c. 8, s. 1; Swinb. Pt. 4, s. 23.

(*h*) Wentw. Off. Ex. c. 14, p. 325, 14th edit.; Godolph. Pt. 2, c. 8, s. 1; Swinb. Pt. 4, s. 23.

(*i*) Godolph. Pt. 2, c. 8, s. 5. And see 2 Prest. on Convey. p. 319 *et seq.* Where the entry of the wrongdoer is general, he is a disseisor of the fee simple, and not an executor *de son tort*: *Ib.* See also Bac. Abr. Executors (B. 3), 1; and *post*, p. 182.

(*k*) *Kenrick v. Burgess*, Moor. 126.

(*l*) *Anon.*, Dyer, 256, *a*; Wentw. Off. Ex. c. 14, p. 324, 14th edit.; Godolph. Pt. 2, c. 8, s. 1; Swinb. Pt. 4, s. 23. In what cases the mere taking possession of the goods of the deceased will or will not create an executorship *de son tort*, see *Read's Case*, 5 Co. 33, *b*; 1 Roll. Ab. 918, pl. 5; Wentw. Off. Ex. 327, 14th edit.; Swinb. Pt. 6, s. 22, pl. 2; *Serle v. Waterworth*, 4 M. & W. 9; *post*, p. 181. Some possession is colourable, and still none in law to charge, &c., as in the case of an overseer or supervisor (see *ante*, pp. 163, 164), or one who is made executor by a Will, which is afterwards disproved by the proving of one later: Dyer, 166, *b*.

(*m*) *In the goods of Geo. White*, Nov. 1882, cited in Tristram & Coote, 13th edit. p. 156, limited to the sale of a ship and protection of cargo; *In the goods of Schwerdtfeger*, 1 P. D. 424, for sale of the goodwill of a school; *In the goods of Roberts*, [1898] P. 149, in which case liberty was given to sell freehold farms and farming stock; *Whitehead v. Palmer*, [1908] 1 K. B. 151.

(*n*) Godolph. Pt. 2, c. 8, s. 1; Swinb. Pt. 4, s. 23.

(*o*) 2 T. R. 97.

And it seems to be established that the agent of an executor *de son tort* collecting the assets, with a knowledge that they belong to the testator's estate, and that his principal is not the legal personal representative, may himself be treated as an executor *de son tort* (p).

So if a man *pays* the debts of the deceased, or the fees about proving his Will, this will constitute him executor *de son tort* (q); but it is otherwise if he pays the debts or fees with his own money (r).

Living in the house, and carrying on the trade of the deceased (a victualler), was held a sufficient intermeddling to make the defendant executor *de son tort*, notwithstanding his wife (the daughter of the deceased) proved the Will, but not till after the action was commenced, and she and her husband were acting together, and were in the house before the death of the testator (s). The Chief Baron MacDonald in the course of his judgment said, "If the plaintiffs find the defendant acting as executor before the probate and bring this action against him, it (the probate) will not relate back so as to abate the suit."

Likewise, if a man sue as executor, or if an action be brought against him as executor, and he pleads in that character, this will make him executor *de son tort* (t).

With respect to fraud, by the statute 43 Eliz. c. 8, after reciting that "forasmuch as it is often put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves or others by their means do take deeds of gifts and authorities by letter of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate,

43 Eliz. c. 8
against pro-
curing ad-
ministration
to be granted
in fraud of
creditors.

(p) *Sharland v. Mildon*, 5 Hare, 468. An English company, which, at the request of the executors of a domiciled American, registered a transfer of his shares without production by the executors of an English probate, was held to have constituted itself executor *de son tort* and therefore liable for probate duty and penalties: *Att.-Gen. v. New York Breweries Co.*, [1898] 1 Q. B. 205; [1899] A. C. 62; reversing Divisional Court, [1897] 1 Q. B. 738.

(q) Godolph. Pt. 2, c. 8, s. 1; Swinb. Pt. 6, s. 22.

(r) *Ibid.*; Wentw. Off. Ex. 326, 14th edit.

(s) *Hooper v. Summersett*, Wightw. 16.

(t) Godolph. Pt. 2, c. 8, s. 1; Com. Dig. Administrator (O. 1).

and so the creditors for lack of knowledge of the place of habitation of the administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet for lack of ability in him to satisfy of his own goods the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts," it is enacted "that every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate upon any fraud as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate, at the time of his decease), shall be charged and chargeable as executor of his own wrong (*u*); and so far only as such goods and debts coming to his hands, or whereof he is released or discharged by such administrator will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm."

A donee of the deceased, in fraud of his creditors, shall be executor *de son tort* if he disposes of the goods.

So, if in his lifetime the deceased made a deed of gift, or bill of sale, of all his goods and chattels to another, in fraud of his creditors, and the donee after the death of the donor disposes of these goods and chattels, by these means he shall be executor in his own wrong (*x*).

When the Will is proved, or administration granted, and another person then intermeddles with the goods, this shall not make him executor *de son tort*, by construction of law, because there is another personal representative of right against whom the creditors can bring their actions; and such a wrongful intermeddler is liable to be sued as a trespasser (*y*). But, though

(*u*) See Godolph. Pt. 2, c. 8, s. 2; Swinb. Pt. 4, s. 23; *Kitchen v. Dixon*, Goldsb. 116, pl. 12; 2 H. Bl. 26, note (*b*).

(*x*) Godolph. Pt. 2, c. 8, s. 1; 1 Sid. 31, pl. 9; 1 Roll. Abr. 549 (C. 1), pl. 3; *Stamford's Case*, 2 Leon. 223; *Hawes v. Leader*, Cro. Jac. 271; *Edwards v. Harben*, 2 T. R. 587.

(*y*) *Anon.*, 1 Salk. 313; Godolph. Pt. 2, c. 8, s. 3. But one who gets the goods of the testator into his hands may be sued as executor *de*

there be a lawful executor or administrator, yet if any other take the goods *claiming them as executor*, or pays debts or legacies, or intermeddles *as executor*, in this case, because of such express claiming to be executor, he may be charged as executor of his own wrong, although there were another executor of right (z). But this has been denied by Lord Kenyon and Sir Thomas Plumer (a).

But there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation (b), directing the funeral, in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects (c), making an inventory of his property (d), feeding his cattle (e), repairing his houses, or providing necessities for his children (f): for these are offices merely of kindness and charity (g).

What acts do not make a man executor *de son tort*.

In the case of *Serle v. Waterworth* (h), the widow of a hairdresser, one Joseph Waterworth, who died in October, 1836,

son tort, although afterwards and before the writ brought, administration be legally granted to another: *Ibid.*; *Kellow v. Westcombe*, 1 Freem. 122.

(z) *Read's Case*, 5 Co. 34, a; Wentw. Off. Ex. 326, 14th edit.; Godolph. Pt. 2, s. 1; Swinb. Pt. 4, s. 23; Com. Dig. Administrator (C. 1).

(a) *Hall v. Elliott*, Peake, N. P. C. 87, decided at Nisi Prius by Lord Kenyon, who said it was impossible there should be a lawful executor, and an executor *de so tort*, at the same time. Observations to the same effect were also made by Sir T. Plumer, M. R., in *Tomlin v. Beck*, 1 Turn. & R. 438, where His Honour held that a person who was permitted by an executor to possess himself of part of the assets of a testator, and who, after the executor's death, and when there was no legal representative, either of the testator or the executor, retained the assets, and acted in the execution of the trusts of the Will, was not executor *de son tort* to the original testator.

(b) Godolph. Pt. 2, c. 8, s. 6. So if one do but take a horse of the deceased, and tie him in his own stable: Godolph. Pt. 2, c. 8, s. 3; Wentw. Off. Ex. 385, 14th edit.

(c) Dyer, 166 b, in margin; Fitzh. Executors, pl. 24; 1 Roll. Abr. 918, Executors (C. 2), pl. 4; Wentw. Off. Ex. c. 14, p. 323, 14th edit.; Godolph. Pt. 2, c. 8, s. 6; *Harrison v. Rowley*, 4 Ves. 216. So where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort*; unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased; which is a question for the jury: *Camden v. Fletcher*, 4 Mees. & W. 378.

(d) Godolph. Pt. 2, c. 8, s. 6.

(e) *Ibid.* s. 8.

(f) Godolph. Pt. 2, c. 8, s. 6.

(g) Swinb. Pt. 2, s. 23; Bac. Abr. tit. Executors (B. 3); 1 Toller, 40.

(h) 4 Mees. & W. 9.

continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold: In December, she received notice of a bond debt of 100*l.* due from him, and had his goods valued: On January 3rd, 1837, on the application of a creditor, to whom Joseph Waterworth, at the time of his death, owed 24*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date: In March, she took out administration: It was held, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort* (*i*).

If another man takes the goods of the deceased, and sells or gives them to me, this shall charge him as executor of his own wrong, but not me (*j*). Accordingly, where a lessee died intestate during the term, and his widow entered, without taking administration, and paid rent, and afterwards her son-in-law took the premises, with her concurrence and with the assent of the landlord, and paid rent and continued to occupy during the remainder of the term; it was held that he could not be considered as assignee in law of the lease; for though the widow might have been chargeable as executrix *de son tort*, he had not made himself executor *de son tort* by taking the premises from her (*k*). In a similar case it was held that the defendant was not liable by privity of estate as the lease was never vested in him and he had not so acted as to make himself liable by estoppel (*l*).

Again, if a person sets up in himself a colourable title to the goods of the deceased, as where he claims a lien on them, though he may not be able to make out his title completely, he shall not be deemed an executor *de son tort* (*m*). So if a man lodge

(*i*) See *S. C.*, on appeal in Exchequer Chamber, *sub nom. Nelson v. Serle*, 4 Mees. & W. 795.

(*j*) Godolph. Pt. 2, c. 8, s. 1; Com. Dig. Administrator (C. 2). It might be otherwise, if a case of collusion could be made out, and possibly he might be sued in equity: *Hill v. Curtis*, L. R. 1 Eq. 90. See also stat. 43 Eliz. c. 8, *ante*, p. 179. The executor of an executrix *de son tort* is not liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled: *Wilson v. Hodson*, L. R. 7 Ex. 84; unless indeed the executor *de son tort* was guilty of a *devastavit* so as to bring the case within 30 Car. 2, c. 7, s. 2, *ib*.

(*k*) *Paull v. Simpson*, 9 Q. B. 365. Comp. *Williams v. Heales*, L. R. 9 C. P. 177 (a case of estoppel).

(*l*) *Stratford-upon-Avon v. Parker*, [1914] 2 K. B. 562.

(*m*) *Flemings v. Jarrat*, 1 Esp. N. P. C. 336. So a creditor getting

in my house, and die there, leaving goods therein behind him, I may keep them, until I can be lawfully discharged of them, without making myself chargeable as executor in my own wrong (*n*). Or if I take the goods of the deceased by mistake, supposing them to be my own, this will not make me executor of my own wrong (*o*).

Likewise, a man who possesses himself of the effects of the deceased, under the authority of and as agent for the rightful executor, cannot be charged as executor *de son tort* (*p*). But, although a person cannot, therefore, be charged as such while he acts under a power of attorney, made by one of several executors who has proved the Will, yet if he continues to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors, who has not proved or administered (*q*).

In *Beavan v. Lord Hastings* (*r*), an Englishman having died intestate in Belgium, possessed of real and personal property there, his brother went over from England and obtained representation to him *pur et simple*, which by the Belgian Law imposed upon him a personal obligation to pay all the debts of the intestate independently of the amount of the assets: The intestate's brother afterwards returned to this country, but did not take possession of any property in England belonging to the intestate: A creditor of the intestate obtained letters of administration to him in England: And it was held by Wood, V.-C., that he could not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. His Honour held also that the intestate's brother, as he had not taken pos-

his debt, whether in money or in kind, does not thereby become an executor *de son tort*: *Hursell v. Bird*, 65 L. T. 709.

(*n*) Godolph. Pt. 2, c. 8, s. 3; Swinb. Pt. 4, s. 23; Com. Dig. Administrator (C. 2).

(*o*) *Ibid.*

(*p*) *Hall v. Elliott*, Peake, N. P. C. 87. A person who deals with the goods of a testator, as agent of executors who afterwards prove the Will, cannot be treated as executor *de son tort*: *Sykes v. Sykes*, L. R. 5 C. P. 113. It has been held, however, to be no defence that the goods were taken by consent of a person to whom administration was afterwards granted: *Parsons v. Mayesden*, 1 Freem. 152. But see *Hill v. Curtis*, L. R. 1 Eq. 90, as to the effect of accounting to such administrator before action brought: *post*, p. 186.

(*q*) *Cottle v. Aldrich*, 4 Maule & Selw. 175. But see *Tomlin v. Beck*, *ante*, p. 181, note (*a*).

(*r*) 2 Kay & J. 724.

session of any of the English property of the intestate, was not an executor *de son tort*.

Question whether a man is executor *de son tort* is one of law: whether he did certain acts is a question of fact.

Liability of executor *de son tort*;

The question whether executor *de son tort*, or not, is a conclusion of law, and not to be left to a jury: whether the party did certain acts is indeed a question for a jury; but when these facts are established, the result from them is a question of law (*s*).

When a man has so acted, as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased (*t*), or by a legatee (*u*): for an executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor (*x*); but an executor *de son tort* can discharge himself by accounting to the rightful executor before suit, although one executor cannot discharge himself by accounting to a co-executor (*y*).

in an action or suit by a creditor of the deceased or a party beneficially interested in his estate.

In an action by a creditor he shall be named executor generally (*z*); for the most obvious conclusion which strangers can form from his conduct is, that he has a Will of the deceased, wherein he is appointed executor, but has not yet proved it (*a*). And accordingly it has been held (*b*), that if a man be sued as

(*s*) *Padget v. Priest*, 2 T. R. 99.

(*t*) Godolph. Pt. 2, c. 8, s. 2. On this ground, in a case where the defendant acted as executor, but did not take out probate till sixteen years after the testator's death, the Lord Chancellor (Eldon) allowed a plea of the Statute of Limitations; because he might have been sued as executor *de son tort*: *Webster v. Webster*, 10 Ves. 93; *Doyle v. Foley*, [1903] 2 Ir. R. 95. See also *Coote v. Whittington*, L. R. 16 Eq. 534, from which case it appears that an executor *de son tort* is liable to an account in equity for such assets as he has received, and so far as you can state that he has received a particular asset, but he is not liable to a general account unless he has received everything. In such an action the personal representative is not a necessary party. As to the personal representative being a necessary party in an administration action, see *post*, Pt. v. Bk. II. Ch. II.

(*u*) 1 Roll. Abr. 910, Executors (F.), pl. 1; Bac. Abr. Executors (B. 3), 3.

(*x*) *Carmichael v. Carmichael*, 2 Phill. C. C. 103, per Lord Cottenham; *Rayner v. Kochler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16 Eq. 534. But see *Cary v. Hills*, L. R. 15 Eq. 79.

(*y*) *Hill v. Curtis*, L. R. 1 Eq. 90—98; and *post*, p. 186.

(*z*) *Coulter's Case*, 5 Co. 31, *a*; Godolph. Pt. 2, c. 8, s. 2; 1 Saund. 265, note (2) to *Osborne v. Rogers*.

(*a*) 2 Black. Comm. 507, 8. The possession and occupation, or meddling with the goods, is that which gives notice to creditors whom they are to sue as executor: By the Lord Dyer, Wentw. Off. Ex. c. 14, p. 322, 14th edit.

(*b*) *Meyrick v. Anderson*, 14 Q. B. 719.

the executor of an executor for a debt of the original testator, it is no answer to the action, that he is only executor *de son tort* to the original rightful executor. If there should be also a lawful executor, they may be joined in the suit, or sued severally: but it is otherwise, if there be a lawful administrator, for he cannot be joined in a suit with the executor *de son tort* (c). Lawful executor and executor *de son tort* may be sued jointly or severally: lawful administrator cannot be joined with executor *de son tort*.

And if the executor *de son tort*, being sued by a creditor, should plead *ne unques executor*, on which issue should be joined, this issue, on proof of acts by the defendant, such as constitute in law an executorship *de son tort*, would be found against him, and the judgment thereon would be, that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator if the defendant have so much, but if not, then *out of the defendant's own goods* (d).

However, though an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit, which a rightful executor may do. And, accordingly, if he pleads properly, he is not liable beyond the extent of the goods which he has administered (e). Therefore, in an action by a creditor of the deceased, under a plea of *plene administravit*, he shall not be charged beyond the assets which came to his hands (f): and in support of this plea, he may give in evidence the payments by himself of just debts of the deceased, of equal or superior degree to that on which the action is brought, which have exhausted such assets (g). So even after action brought, he may apply the assets, which are in his hands, to the payment of a debt of superior degree, and plead such payment in bar of the action (h). So he may give in evidence, under the same plea, that he has delivered the assets to the Executor *de son tort* protected in all acts not for his own benefit which rightful executor may do.

(c) Wentw. Off. Ex. p. 328, 14th edit.; Godolph. Pt. 2, c. 8, s. 2; Com. Dig. Administrator (O. 3). There cannot be an administrator *de son tort*: the law knows no such appellation: Godolph. Pt. 2, c. 8, s. 2.

(d) Wentw. Off. Ex. c. 14, pp. 331, 332, 14th edit.; 1 Saund. 336, b, note (10) to *Hancock v. Prowd*; *Hooper v. Summersett*, Wightw. 19, by Thompson, B.

(e) Godolph. Pt. 2, c. 8, s. 2; Wentw. Off. Ex. 331, 14th edit.

(f) Dyer, 166, b, in margin; 1 Saund. 265, note (2) to *Osborne v. Rogers*; *Hooper v. Summersett*, Wightw. 21, *per curiam*; *Yardley v. Arnold*, Carr. & M. 434.

(g) Wentw. c. 14, pp. 333, 334, 14th edit.; *Mountford v. Gibson*, 4 East, 454, in the judgment of Le Blanc, J., 2 Black. Comm. 508; Bac. Abr. Executors (B. 3), 2.

(h) *Oxenham v. Clapp*, 2 Barn. & Adol. 309. See further, *post*, Pt. III. Bk. IV. Ch. II. § 1.

rightful executor or administrator *before* action brought (*i*). An executor *de son tort* may well plead *ne unques executor* and also *plene administravit*, and, although on the former issue he should be unsuccessful, he may have a verdict on the latter (*k*).

But it is no defence either under a plea of *plene administravit*, or a special plea, that *after* action brought, and before plea pleaded, the defendant delivered over the assets to the rightful executor or administrator (*l*): not even, though, in fact, no administration was granted to any one till after the action was brought (*m*). So payments made by an executor *de son tort*, pending a suit in equity for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, were not allowed (*n*).

At law an executor *de son tort* cannot discharge himself unless he hands over the property to the rightful representative, before action brought (*o*). The rule in equity follows the rule at law; so that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to an action against him for an account (*p*).

The agent of an executor *de son tort*, who has, by collecting the assets, made himself also liable as executor *de son tort*, cannot discharge himself by showing that he has duly accounted for his receipts to his principal; for the rule that the receipt of the agent is the receipt of the principal does not apply to the case of a wrong-doer (*q*).

An executor *de son tort* cannot give in evidence, under *plene administravit*, or specially plead, a retainer for his own debt:

Executor *de son tort* cannot plead a retainer for his own debt:

(*i*) *Anon.*, 1 Salk. 313; *Padget v. Priest*, 2 T. R. 97, in the judgments of Ashurst, J., and Buller, J.; *Curtis v. Vernon*, 3 T. R. 590, in Lord Kenyon's judgment; *Hill v. Curtis*, L. R. 1 Eq. 90. See also *Samuel v. Morris*, 6 C. & P. 620.

(*k*) *Hooper v. Summersett*, Wightw. 20, by Wood, B.

(*l*) *Curtis v. Vernon*, 3 T. R. 587; *S. C.*, affirmed in error, 2 H. Black. 18. The reason seems to be that the creditor would thereby be put into a worse situation; he would have to bring a second action against the rightful executor: *Oxenham v. Clapp*, 2 B. & Adol. 315.

(*m*) *Curtis v. Vernon*, 3 T. R. 587; 2 H. Bl. 18.

(*n*) *Layfield v. Layfield*, 7 Sim. 172. But see *Hill v. Curtis*, L. R. 1 Eq. 90.

(*o*) *Curtis v. Vernon*, 3 T. R. 587.

(*p*) Per Wood, V.-C., in *Hill v. Curtis*, L. R. 1 Eq. 90, dissenting from dictum of Lord Cottenham in *Carmichael v. Carmichael*, 2 Ph. 101.

(*q*) *Sharland v. Mildon*, 5 Hare, 469. Unless the executor *de son tort* subsequently become administrator: *Ibid.*; *Hill v. Curtis*, L. R. 1 Eq. 90, 100.

for otherwise the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him (r). And it will make no difference though the debt due to the executor *de son tort* be of a superior degree to that of the creditor who brings the action against him (s): Nor though the rightful executor or administrator has assented to such retainer (t). If the executor *de son tort* should plead the retainer to satisfy his own debt, the plaintiff, though he had sued the defendant as executor generally, may reply, that he is executor *de son tort* (u). If he attempts to give the retainer in evidence, under *plene administravit*, the plaintiff must show the Will, and who are the rightful executors (x).

even though debt is of superior degree :
or though rightful executor or administrator assent to retainer :

Yet if an executor *de son tort* afterwards, even *pendente lite*, obtains administration, he may retain; for it legalises those acts which were tortious at the time (y). And, therefore, if subsequently to the replication that he is executor *de son tort*, he obtains administration, he may rejoin that fact; for it is consistent with the retainer in the plea (z).

but he may retain if afterwards he obtain administration.

With respect to the liability of an executor *de son tort* at the suit of the lawful representative of the deceased, there are several authorities to show, that if the rightful executor or administrator bring an action of trover or trespass, the executor *de son tort* may give in evidence, under the general issue, and in mitigation of damages, payments made by him in the rightful course of administration (a): upon this ground, that the pay-

His liability in an action by the rightful executor.

(r) *Coulter's Case*, 5 Co. 30, a; S. C., Oro. Eliz. 630; Wentw. Off. Ex. c. 14, p. 333, 14th edit.

(s) *Curtis v. Vernon*, 3 T. R. 587; 2 H. Bl. 18.

(t) *Ibid.*

(u) *Alexander v. Lane*, Yelv. 137.

(x) *Arnold v. Arnold*, Buller, N. P. 143.

(y) *Pyne v. Woolland*, 2 Vent. 180; *Williamson v. Norwitch*, Sty. 337; 1 Saund. 265, note (2), to *Osborne v. Rogers*. But if administration be granted to one after he hath intermeddled wrongfully with the deceased's goods, this will not purge the wrong done before; and, therefore, a creditor may sue him as executor *de son tort*, or as a lawful administrator, at his election; but this seems for the goods that he had administered before rightful administration committed unto him: *Laury v. Aldred*, 2 Brownl. 185; Godolph. Pt. 2, c. 8, s. 2; Com. Dig. Administrator, O. 1.

(z) *Vaughan v. Browne*, 2 Stra. 1106; S. C., Andr. 328; 1 Saund. 265, note (2), to *Osborne v. Rogers*. But see *Whitehead v. Sampson*, 1 Freem. 265.

(a) *Padget v. Priest*, 2 T. R. 100, by Buller, J.; *Mountford v. Gibson*, 4 East, 454, by Le Blanc, J.; 2 Black. Comm. 508; Bac. Abr. Exors. (B. 3) 1; *Fyson v. Chambers*, 9 M. & W. 468, per Lord Abinger. It is said in Buller's *Nisi Prius*, 7th edit. p. 48, that perhaps in trover he could not give in evidence payment of debts to the value of such

ments which are thus, as it is termed, *re-couped* in damages, were such as the lawful executor or administrator would have been bound to make; and, therefore, it cannot be considered as any detriment to him, that they were made by an executor *de son tort* (b). But the executor *de son tort* cannot *plead*, in bar to an action by the rightful executor or administrator, payments of debts, &c., to the value of the assets, or that he has given the goods in satisfaction of the debts (c); and, although the payments proved, under the general issue, to have been made by the executor *de son tort*, amount to the full value of the goods sought to be recovered in the action of trespass or trover, the lawful executor or administrator shall not be nonsuited, but will still be entitled to a verdict for nominal damages (d). In the case of *Woolley v. Clark* (e), however, a Will was proved by the executor named in it, who, after probate, sold the goods of the testator: At the time of the sale he had notice of a subsequent Will, which was afterwards proved, and the probate of the former Will revoked on citation: whereupon the executor, under the latter Will, brought trover against the executor under the former, for the goods sold: and it was holden, that the action was sustainable to recover the full value, *and that the defendant was not entitled, in mitigation of damages*, to show that he had administered assets to the amount; but the authorities in favour of the right of an executor *de son tort* to recover in damages payments made in a due course of administration were not cited.

But this re-couping in damages can only be allowed to the executor *de son tort* in cases where there are sufficient assets to satisfy all the debts of the deceased; for otherwise the rightful executor or administrator would be precluded, not only from giving preference to one creditor over others of equal degree, which is one of the privileges of his office, but also from satisfy-

goods as were still in his custody; but only for such as he had sold: *sed quære*.

(b) By Lawrence, J., in *Mountford v. Gibson*, 4 East, 451.

(c) *Whitehall v. Squire*, Carth. 104, by Holt, C. J.; 2 Black. Comm. 508; *Elworthy v. Sandford*, 3 Hurl. & C. 336.

(d) *Anon.*, 12 Mod. 441; 2 Phillipps on Evid. 234, n. 6, 7th edit. The contrary is laid down as to the action of trover, in Buller's *Nisi Prius*, 7th edit. p. 48; but the authority cited for this position does not support it, and it is, as it seems, incorrect. See *Mountford v. Gibson*, 4 East, 447, by Lord Ellenborough; Roscoe on Evidence, 15th edit. 1110.

(e) 5 B. & A. 744, explained in *Hewson v. Shelley*, [1914] 2 Ch. 13.

ing his own debt, in priority to all those of equal degree, by way of retainer (f).

It remains to be considered, what effect the acts of an executor *de son tort* may have on the goods of the deceased, with relation to the rightful executor or administrator and the alienee of the executor *de son tort*.

What effect the acts of an executor *de son tort* shall have on goods aliened by him.

It is laid down in *Coulter's Case* (g), that "it is clear that all lawful acts, which an executor *de son tort* doth, are good." So it was said in *Graysbrook v. Fox* (h), by Walsh, *quod alii duo Justiciarii concesserunt*, that if an administrator under a grant which is void (by reason of there being a Will and executor) aliens the goods of the deceased to pay the funeral, or debts, the sale is good and indefeasible. And Lord Holt, in *Parker v. Kett* (i), laid down that a legal act done by an executor *de son tort* shall bind the rightful executor, and shall alter the property; and that the reason is, because the creditors are not bound to seek further than him who acts as executor; therefore, if an executor *de son tort* pays 100*l.* of the testator's in a bag to a creditor, the rightful executor shall not have trover against the creditor (k).

But when it is thus generally laid down, that payments made in the due course of administration, by one who is executor *de son tort*, are good, that must be understood of cases where such payments are made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong, in the very instance complained of, by one taking upon himself to hand over the goods of the deceased to a creditor. Thus in *Mountford v. Gibson* (l), the goods in question had originally been sold by the defendant to the intestate in his lifetime; on his death, they not having been paid for, on application to the intestate's widow for that purpose, she delivered them back to the defendant, in satisfaction of his demand: No other acts appeared to have been done by the

(f) Wentw. Off. Ex. c. 14, p. 335, 14th edit.; *Mountford v. Gibson*, 4 East, 453, in the judgment of Lawrence, J.; 2 Black. Comm. 507, 8; *Elworthy v. Sandford*, 3 Hurl. & C. 330.

(g) 5 Co. 30, b.

(h) Plowd. 282. This case was overruled in *Hewson v. Shelley*, [1914] 2 Ch. 13, but the above dictum as far as it goes seems to be accurate.

(i) 1 Lord Raym. 661; *S. C.*, 12 Mod. 471.

(k) See also the judgment of Le Blanc, J., in *Mountford v. Gibson*, 4 East, 454; and of Littledale, J., in *Oxenham v. Clapp*, 1 B. & Ad. 313.

(l) 4 East, 441.

widow, to show that she had before taken upon herself to act as executrix: The administrator brought trover for the goods against the creditor; on whose behalf it was contended, that he had a right to protect himself in the action under such payment by the widow as executrix *de son tort*: But the Court of King's Bench held, on the ground above stated, that this was no defence. Accordingly in *Thomson v. Harding* (*m*), it was laid down in the judgment of the same Court that the law is not that as against the true representative every payment from the assets of the deceased shall be valid, if made by a person who has so intermeddled with the property of the deceased as to render himself liable to be sued as executor *de son tort*; but that where the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property.

It must further be observed that the act of an executor *de son tort* is good against the true representative of the deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration (*n*).

Where a man has acted as executor *de son tort*, and afterwards obtains letters of administration, a question may arise, how far he is bound, in his character of rightful administrator, by his own acts done while executor *de son tort*. This subject will be considered hereafter, together with the question as to what may be done by an administrator before letters of administration are granted (*o*).

How far an administrator is bound by his own acts as executor *de son tort*.

(*m*) 2 E. & B. 630.

(*n*) *Buckley v. Barber*, 6 Exch. 164.

(*o*) *Post*, Pt. I. Bk. V. Ch. I. § II.

CHAPTER THE SIXTH.

THE EXECUTOR'S REFUSAL OR ACCEPTANCE OF THE OFFICE.

SECTION I.

When and how the office may be refused.

THE office of executor being a private one of trust, named by the testator, and not by the law, the person nominated may refuse, though he cannot assign the office (*a*); and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede (*b*).

Executors cannot be compelled to accept the office:

But though the executor cannot be compelled to accept the executorship, whether he will or not, yet by stat. 21 Hen. VIII. c. 5, s. 8, the Ordinary might convene before him (*c*) any person made and named executor of any testament, "to the intent to prove or refuse the testament," and if he neglected to appear, he was, previous to the stat. 53 Geo. III. c. 127, punishable by excommunication for a contempt (*d*); and might subsequently be dealt with in the mode substituted by that statute, s. 2, for excommunication (*e*). This power of citation to take or refuse probate was, it is apprehended, transferred to the Court of Probate by the 23rd section of the Court of Probate Act, 1857, and is now vested in the Probate Division of the High Court of Justice, and a neglect to appear to the citation may be punished as for a contempt of the Court under the 25th section.,

but might be convened by the Ordinary to accept or refuse.

(*a*) Bac. Abr. Exors. (E.) 9. See *Douglas v. Forrest*, 4 Bingh. 704, in the judgment of Best, C. J. And see *Mohamidu Mohideen Hadjar v. Pitchev*, [1894] A. C. 437.

(*b*) *Doyle v. Blake*, 2 Scho. & Lef. 239. The Public Trustee may decline to accept the office, but not on the ground only of the small value of the property, and he is in certain cases prohibited from accepting the office: Public Trustee Act, 1906, s. 2 (3), (4).

(*c*) See stat. 1 Edw. VI. c. 2, as to the form of the citation.

(*d*) Wentw. Off. Ex. 88, 14th edit.; Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 4.

(*e*) See stat. 2 & 3 Will. IV. c. 93 (Act for enforcing process upon contempts in the Courts Ecclesiastical).

The time allowed to the person named executor, to deliberate whether he will accept or refuse the executorship, is uncertain, and left to the discretion of the judge, who has used, at his pleasure, not only within the year, but within a month or two, to issue his citation (*f*).

Letters *ad colligendum*,

administra-
tion *cum*
testamento
annexo.

Stat. 21 & 22
Vict. c. 95,
s. 16:

executor sur-
viving and
dying without
proving or not
appearing to
a citation to
be treated as
if he had
not been
appointed.

In what cases
an executor
may refuse:

If he appear, either on citation or voluntarily, and pray time to consider whether he will act or not, the Ordinary might, though the practice seems now obsolete, grant letters *ad colligendum* in the interim (*g*). But if he appear, and refuse to act, or fail to appear to the above-mentioned process, administration *cum testamento annexo* will be granted to another (*h*).

By stat. 21 & 22 Vict. c. 95, s. 16, "whenever an executor appointed in a Will survives the testator but dies without having taken probate, and whenever an executor named in a Will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor" (*i*).

Although, as above stated, an executor has his election

(*f*) Swinb. Pt. 6, s. 4; Godolph. Pt. 2, c. 19, s. 1. As to the position of an executor who consents to prove the Will on condition that the beneficiaries execute a deed of indemnity, see *Re Clay*, [1919] 1 Ch. 66.

(*g*) *Broker v. Charter*, Cro. Eliz. 92; Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 4; Toller, 41.

(*h*) Swinb. Pt. 6, s. 1, pl. 3, s. 2, pl. 3, 4. In *In the goods of Roberts*, [1898] P. 149, a grant *ad colligendum* was made to enable the administratrix of the husband of the testatrix to let and manage the farms till the heir-at-law could be cited. See *ante*, p. 178. See as to administration *cum testamento annexo*, generally, *post*, Pt. I. Bk. v. Ch. III. § 1.

(*i*) This enactment seems, in effect, to extend the 79th section of the stat. 20 & 21 Vict. c. 77 (*post*, p. 199), to the case of a party cited, who will not renounce or take any step. Therefore, where an executor to whom power has been reserved survives his acting co-executor, and does not appear to a citation, the case will stand as if his name had never appeared in the Will, and the executor, if any, of the acting executor will be the representative of the original testator: *In the goods of Noddings*, 2 Sw. & Tr. 15; *In the goods of Reid*, [1896] P. 129; and see *Re Boucherett*, [1908] 1 Ch. 180. So on the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased: *In the goods of Lorimer*, 2 Sw. & Tr. 471. The section applies where the executor is cited to take probate of a copy of a Will, and does not appear: *Davis v. Davis*, 31 L. J. P. M. & A. 216. See also *ante*, p. 176, and *post*, p. 197, n. (*r*).

whether he will accept or refuse the executorship, yet he may determine such election, by acts which amount to an administration. For if he once administer, it is considered that he has already accepted of the executorship, and the Court may compel him to prove the Will (*k*). And if an executor take possession of, and in any way administer, any part of the personal estate, without obtaining probate of the Will within six months of the death of the testator, or within two months after the termination of any suit or dispute respecting the Will, if there be any such, which shall not be ended within four months after the death of the testator, he is liable to a penalty of *double the amount of duty chargeable*, which penalty becomes a debt due from him to the Crown, recoverable by any of the ways or means in force for the recovery of probate, legacy or succession duties (*l*).

he cannot if he once administer.

Executor liable to penalty of double duty if he does not obtain probate within six months of testator's death : or within two months of termination of probate suit.

If the executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter: And it has now been decided in accordance with the practice of the Prerogative Court that he cannot take upon himself the latter and refuse the former (*m*).

Nor can executor of an executor refuse if he once administer.

Although there are old cases to the contrary, the law is now taken to be, that if the executor has acted, and the Court, not knowing it, commits administration to another, the administration may be revoked, and the executor compelled to prove the Will; for an executor who has intermeddled cannot subsequently renounce, nor has the Court power to authorize him to do so (*n*), yet the grant of administration *cum testamento annexo*, until so revoked, is valid; and, consequently, in neither of these cases can a debtor to the testator, in answer to a suit by such administrator, set up the act in *pais* of the executor

(*k*) Godolph. Pt. 2, c. 19, s. 2; Swinb. Pt. 6, s. 2, pl. 6, s. 22, pl. 1; Bro. Exors. pl. 90; *Long v. Symes*, 3 Hagg. 774; *Mordaunt v. Clarke*, L. R. 1 P. & D. 592; *Re Stevens*, [1897] 1 Ch. 422, [1898] 1 Ch. 162. See *infra*, n. (*p*).

(*l*) 55 Geo. III. c. 184, s. 37, amended by the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12, s. 40): *Att.-Gen. v. New York Breweries Co.*, [1899] A. C. 62.

(*m*) *Brooke v. Haymes*, L. R. 6 Eq. 25; *In the goods of Perry*, 2 Curt. 655.

(*n*) *Jackson v. Whitehead*, 3 Phillim. 577; and see *Re Stevens*, *ubi sup.*; 1 Roll. Abr. Exor. (C.) 2, p. 907; Wentw. Off. Ex. 91, 92, 14th edit.; Godolph. Pt. 2, c. 31, s. 3; 2 Scho. & Lefr. 237. *Factum valet*, says Wentworth, *quod fieri non debuit*. See also *Jackson v. Whitehead*, 3 Phillim. 577.

against his renunciation, in order to delay or prevent a recovery by the administrator (o).

Renunciation of one of several executors after intermeddling invalid.

If one of several executors, after intermeddling with the effects, renounces, his renunciation is invalid, and the record of it on the probate granted to his co-executors ought to be cancelled (p).

The executor is liable to be sued, although administration be granted to another, if he has administered.

The only sense in which the committing of the administration under such circumstances can now be said to be void is, as far as respects the protection of the executor: for if he has once administered, he will remain liable to be sued as executor, both at law and in equity, in spite of his renunciation, and the consequent appointment of an administrator (q). So if an executor administer to part of the assets, he shall be charged with the receipts, as executor, though he renounced the executorship, and paid the money to the other executor who proved the Will (r).

Question of liability to creditors and legatees of executor renouncing after act of administration.

The general question as to the liability, to creditors and legatees, of an executor who renounces after an act of administration, or who proves the Will, and then professes to renounce his representative character, will be considered at large in a subsequent part of this Treatise (s).

What amounts to an administration.

With respect to what acts will amount to an administering, such as to render an executor compellable to take probate, two general rules may be laid down: 1st, That whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship, will regularly amount to an administration. 2ndly, That whatever acts will make a man liable as an executor *de son tort* (t), will be deemed an election of the executorship (u).

(o) *Doyle v. Blake*, 2 Scho. & Lefr. 237; *Hewson v. Shelley*, [1914] 2 Ch. 13.

(p) *In the goods of Badenach*, 3 Sw. & Tr. 465, in which case one of several co-executors who had renounced after intermeddling was allowed, notwithstanding sect. 79 of 20 & 21 Vict. c. 77, to retract his renunciation on the ground that the renunciation was invalid after intermeddling: *Re Stevens*, [1897] 1 Ch. 422; [1898] *ib.* 162; in which case Vaughan Williams, L. J., says, "I think no action would lie for neglect to take out probate, as no such action appears ever to have been brought; and I think that plaintiff's only remedy is by citing the executor in the Probate Division."

(q) Wentw. Off. Ex. 92, 14th edit.

(r) *Read v. Truelove*, Ambl. 417.

(s) *Post*, Pt. IV. Bk. II. Ch. II. § II.

(t) See *ante*, Ch. V., as to what acts will constitute a man executor *de son tort*.

(u) *Godolph. Pt. 2, c. 8, s. 1, and s. 6*; *Bac. Abr. tit. Executors (E.)*

Hence, it has been adjudged, that if the executor takes possession of the testator's goods, and converts them to his own use, or disposes of them to others, this is an administration (*x*). So if he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration (*y*). As where the testator being tenant at will of certain goods, his executor seized the goods, supposing them to belong to the testator, with an intent to administer; it was holden, that his intention appearing, this made him executor in law (*z*).

Where a man who was named as one of several executors, in answer to an inquiry who were the executors, wrote a letter, saying, that he and others were executors, this was held to afford sufficient evidence that he had acted as executor (*a*).

But if an executor seizes the testator's goods, claiming a property in them himself, though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shows a different view and intention in him than that of administering as executor (*b*).

If an executor receives debts due to the testator, and, especially if he gives acquittances for such debts, this amounts to an election of the executorship; so, if he releases a debt due to the testator (*c*).

So if there are two executors, and one of them hath a specific legacy devised to him, and he takes possession of it, without the consent of his co-executor, this amounts to an administration; for a legatee cannot take a personal chattel bequeathed to him, without the assent of the executor (*d*).

In the case of *Long v. Symes* (*e*) the insertion of an advertisement calling on persons to send in their accounts, and to pay money due to the testator's estate, to A. and B. "his executors

10; Toller, 43; *Rayner v. Green*, 2 Curt. 248. But see Wentw. Off. Ex. c. 3, p. 94, 14th edit.

(*x*) Wentw. c. 3, p. 93, 14th edit.; or even take them into his hands, some say, without converting them: *Ibid*.

(*y*) 1 Roll. Abr. 917, pl. 12; Bac. Abr. tit. Executors (E.) 10.

(*z*) 1 Roll. Abr. 917, pl. 13; Bac. Abr. tit. Executors (E.) 10.

(*a*) *Vickers v. Bell*, 10 Jur. N. S. 376; 3 N. R. 624. And see *Re Stevens*, [1897] 1 Ch. 422; [1898] 1 Ch. 162.

(*b*) Bac. Abr. tit. Executors (E.) 10.

(*c*) Wentw. Off. Ex. 94, 14th edit.; Swinb. Pt. 6, s. 22, pl. 2; 1 Roll. Abr. 917, pl. 7, 8; *Pytt v. Fendall*, 1 Cas. temp. Lee, 553.

(*d*) 1 Roll. Abr. 917, tit. Exor. (B.) pl. 9; Bac. Abr. tit. Exor. (E.) 10. See *infra*, Pt. III. Bk. III. Ch. IV. § III.

(*e*) 3 Hagg. 771.

in trust," was held to make them compellable to take probate, and to subject them personally to the costs occasioned by their resistance: the estate being small, and left for two years and a half without a representative.

An executor who has not proved is not to be considered as acting by assisting a co-executor, who has proved, in writing letters to collect debts, nor by writing directly to a debtor of the testator, and requiring payment (*f*). But in *Harrison v. Graham* (*g*), Barbara Graham by Will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died: Margaret alone proved the Will, and acted chiefly as executor, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock: Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. Stock, received the money, and paid it over the same day to Margaret: After this she and the mother died making Robert their executor: It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other: But Lord Hardwicke held that this was such an act of administration in Robert, as should make him chargeable as to his own estate (*h*).

An executor
may renounce
after he is
sworn.

Taking the oath as executor is not to be considered as an intermeddling such as to preclude renunciation (*i*); but an executor cannot renounce after he has taken probate (*k*). In a case indeed, decided 31 Car. II., the executor named in the Will had taken the usual oath, and then refused (but after a *caveat* entered); and another endeavoured to obtain letters of administration: the executor came afterwards to desire the Will under probate, and contested the granting of administration: and it was adjudged against him, supposing that he was bound by the refusal: But after an appeal to the Delegates, a *mandamus* was prayed, and granted by the Court of King's Bench: for that, having taken the oath, he could not be admitted to

(*f*) *Orr v. Newton*, 2 Cox, 274. See also *Stacey v. Elph*, 1 M. & K. 195.

(*g*) 3 Hill's MSS. 239; 1 P. Wms. 241, n. (*y*) to 6th edit.

(*h*) The judgment in this case will be found fully stated, *post*, Pt. IV. Bk. II. Ch. II. § II.

(*i*) *Macdonell v. Prendergast*, 3 Hagg. 216.

(*k*) *In the goods of Veiga*, 32 L. J. P. M. & A. 9; cf. *ante*, p. 193.

refuse, and the Ecclesiastical Court had no further authority (*l*). However, if he has not administered, the Court will now, upon his own application, dismiss him, and allow him to renounce probate, even after the usual oath, and an appearance given as executor. Such a renunciation was permitted in the case of *Jackson v. Whitehead* (*m*), in order that the executor might be examined as a witness; and Sir John Nicholl, in giving his judgment, seemed to doubt the correctness of the report of the former case, and said, that at most it only decided that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship.

With respect to the mode of refusal by the executor, it is laid down that refusal cannot be verbally, or by word; but it must be by some act entered or recorded in the Spiritual Court; and therefore must be done before some judge spiritual, and not before neighbours in the country (*n*). But if the executor sent a letter to the Ordinary, by which he renounced, and the refusal be recorded, it was sufficient. As in a case where Sir Ralph Rowlet made the Lord Keeper Bacon, C. J. Catlin, and the Master of the Rolls, executors; they wrote a letter to the Ordinary, that they could not attend the executorship, and therefore wished him to commit administration; who did so, making every one of their refusals to be recorded; and this was held good (*o*). And accordingly it has been held that the renunciation need not be under seal (*p*).

How an executor may renounce:

the refusal must not be in *pais*, but in the Spiritual Court:

Until the refusal is recorded, no person can take administration (*q*), and until the refusal has been recorded it can be withdrawn (*r*).

until refusal recorded no one can take administration:

In case the Ordinary himself were made executor, then he might have refused before his own commissary (*s*).

before whom, when the Ordinary himself is executor:

If a party renounce in person, he takes an oath that he has not intermeddled in the effects of the deceased, and will not

(*l*) *Anon.*, 1 Vent. 335.

(*m*) 3 Phillim. 577. See also *Long v. Symes*, 3 Hagg. 774.

(*n*) Wentw. Off. Ex. 88, 14th edit.; *Long v. Symes*, 3 Hagg. 776.

(*o*) *Broker v. Charter*, Cro. Eliz. 92; *S. C.*, Owen, 44; Moor, 272; 1 Leon. 135; Wentw. Off. Ex. 88, 14th edit.; Godolph. Pt. 2, c. 19, s. 4.

(*p*) *In the goods of Boyle*, 3 Sw. & Tr. 426.

(*q*) *Long v. Symes*, 3 Hagg. 776.

(*r*) *In the goods of Morant*, L. R. 3 P. & D. 151. Administration will not be granted on the consent of the executor. The executor must either renounce probate or fail to appear to citation under stat. 21 & 22 Vict. c. 95, s. 16, *ante*, p. 192; *Garrard v. Garrard*, L. R. 2 P. & D. 238. And see *In the goods of Reid*, [1896] P. 129, *ante*, p. 176.

(*s*) Wentw. Off. Ex. 89; Bro. Ordinary, pl. 13.

form of
renunciation:

intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with (*t*).

executor de-
clining the
usual oath:

If the executor refuse to take the usual oath, or being a Quaker to make the affirmation, this amounts to a refusal of the office, and shall be so recorded (*u*).

his renuncia-
tion cannot
be in part:

An executor cannot in part refuse. He must refuse entirely, or not at all (*x*). An exception has been supposed to exist in the case of his testator being executor to another person; for, it has been said, he might well assent to be executor to the one testator, and refuse for the other. But it has now been decided in accordance with the established practice of the Prerogative Court that he can not do so (*y*).

the renuncia-
tion will not
be received
unless accom-
panied by
the Will.

It was the practice of the Prerogative Office of Canterbury not to receive the renunciation of a party, unless it were accompanied by the original Will of the deceased, probate of which it purported to renounce (*z*).

The present practice is, that the executor intending to renounce signs the common form of renunciation in the presence of a witness, and the form is then filed in the register of the Probate Division. A renunciation does not exist as an effective instrument until it has been recorded and filed, and until then it may be withdrawn (*a*).

SECTION II.

The consequence of Renunciation by an Executor.

Former prac-
tice as to re-
traetation by

Prior to the passing of stat. 20 & 21 Vict. c. 77, s. 79, it had been established, by the practice of the Prerogative Court and

(*t*) Toller, 42. The usual practice of the Registry has been to require renunciation to be under the hand of the party entitled to the grant. But where he is out of England, an authority to renounce by power of attorney may suffice: *In the goods of Hosser*, 3 Sw. & Tr. 490.

(*u*) *Rex v. Raines*, 1 Lord Raym. 363, per Holt, C. J.; Toller, 41. As to the effect of an executor not appearing when cited to take probate, see *ante*, p. 192.

(*x*) *Paule v. Moodie*, 2 Roll. Rep. 132; 11 Vin. Abr. 139, pl. 10; *Doyle v. Blake*, 2 Scho. & Lef. 239, 245. In this case Lord Redesdale said: "Executors must either wholly renounce, or if they act to a certain extent as executors and take upon them that character, they can be discharged only by administering the effects themselves, or by putting administration into the hands of a Court of Equity."

(*y*) *Brooke v. Haymes*, L. R. 6 Eq. 25; *In the goods of Perry*, 2 Curt 655.

(*z*) *In the goods of Fenton*, 3 Add. 35.

(*a*) *In the goods of Morant*, L. R. 3 P. & D. 151.

the decided cases, that the renunciation of an executor might be retracted at any time before administration granted, and that where there was a sole executor who renounced or several who all renounced and administration was granted, the renunciation could never be retracted; but that where there were several executors and some renounced and others proved the Will the renunciation was not peremptory, but might be retracted at any time before any actual grant of administration *de bonis non*, but not afterwards (*b*).

But now by stat. 20 & 21 Vict. c. 77, s. 79, "where any person, after the commencement of this Act, renounces probate of the Will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation of the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor" (*c*).

"By rule 50, P. R. (non-contentious business), no person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the deceased in another character" (*d*).

executor of
renunciation.

Modern practice under
stat. 20 & 21
Vict. c. 77,
s. 79.

Rights of an
executor re-
nouncing
probate to
cease as if he
had not been
named in the
Will.

Rule 50, P. R.
No person
renouncing in
one character
to take repre-
sentation in
another.

(*b*) See as to the practice and authorities prior to 20 & 21 Vict. c. 77, s. 79, the earlier Editions of this Work: Pt. I. Bk. III. Ch. VI. § II.

(*c*) See *In the goods of Noddings* and *In the goods of Lorimer*, ante, p. 192, note (*i*). There is nothing in this enactment to prevent the Court from allowing a retraction of the renunciation according to the old practice in a case fit for it: *In the goods of Balenach*, 3 Sw. & Tr. 465; *In the goods of Stiles*, [1898] P. 12. But such retraction will not be allowed unless it can be shown that it will be for the benefit of the estate or of those interested under the Will: *In the goods of Gill*, L. R. 3 P. & D. 113; *In the goods of Loftus*, 3 Sw. & Tr. 307. This section does not apply to an executor who renounced before the Act came into force: *In the goods of Whitham*, L. R. 1 P. & D. 303.

(*d*) See *In the goods of Loftus*, 3 Sw. & Tr. 307, from which it appears that this rule is capable of modification by the Court. See also *In the goods of Wheelwright*, 3 P. D. 71. In the case of *In the goods of Russell*, L. R. 1 P. & D. 634, the Court allowed one who had been appointed executor and renounced that office, to take administration *test. annexo* as attorney of the other executors notwithstanding rule 50. Lord Penzance, in the course of his judgment in the last-mentioned case, said: "As regards the application of the 50th rule to this case, I think that the words, 'No person who has renounced in one character shall take a representation to the same deceased in another character,' must mean that where a man under a Will occupies in reference to the testator two different characters, he shall not select either one he pleases as the basis of his grant, but must take administration on the largest ground. He cannot throw aside probate and take a more limited grant. That rule does not conflict with the decision

Whether
executors
may, after
renouncing,
exercise a
power.

It was said by very eminent writers, that where a power was given to executors, they might exercise it, although they renounced probate of the Will (*e*). But with the greatest deference to their authority, it may be doubted whether the position is true, unless when the power is given them in their proper names, and without reference to their office as executors (*f*).

With regard to trusts coming into operation since 1881, the Conveyancing Act, 1911, s. 8, enacts that, "Until the appointment of new trustees the personal representatives or representative for the time being of a sole trustee, or where there were two or more trustees then of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to or capable of being exercised by the sole or last surviving or continuing trustee," unless the trust instrument contains a contrary direction. The section does not apply to an executor who has not proved nor to land of copyhold or customary tenure (*g*).

If a debtor makes his creditor and another his executors, and the creditor neither intermeddles, nor proves the Will, he may bring an action against the other executor (*h*).

An executor
who re-
nounces may
sue his co-
executor.

the Court has arrived at." As to renunciation by a next of kin, see *post*, Pt. I. Bk. v. Ch. III. § 1.

(*e*) 1 Sugden on Powers, 138, 6th edit.; 2 Prest. on Abstr. 264.

(*f*) See Perkins, No. 548. See also the cases of *Yates v. Compton*, 2 P. Wms. 309, and *Keates v. Burton*, 14 Ves. 434 (which is cited by Sir E. Sugden). In the latter case, a power was given to "my said trustees and executors," and one of the executors died and the other renounced, without exercising it: Sir W. Grant observed, "The power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent to them to exercise it." The view taken by the Author in the text has been confirmed by the decision of the Court of Appeal in *Crawford v. Forshaw*, [1891] 2 Ch. 261; in which case it was held that an executor, who had renounced probate, could not act in the exercise of a power of selecting charities and distributing a residue amongst them: and that the power was given to the executor in the character of executor, and that the two who had proved could exercise it alone. See also *Re Smith*, [1904] 1 Ch. 139; *Re De Sommery*, [1912] 2 Ch. 622.

(*g*) 1 & 2 Geo. 5, c. 37, s. 8.

(*h*) *Dorchester v. Webb*, Sir W. Jones, 345; *Rawlinson v. Shaw*, 3 Term Rep. 557. See *post*, Pt. III. Bk. I. Ch. II.

BOOK THE FOURTH.

PROBATE.

CHAPTER THE FIRST.

THE NECESSITY OF OBTAINING PROBATE IN THE PROBATE DIVISION, THE JURISDICTION AND AUTHORITY OF THAT COURT: AND THE ACTS AND LIABILITIES OF AN EXECUTOR BEFORE PROBATE.

SECTION I.

The Will must be proved in the Probate Division.

IT appears to have been a subject of much controversy, whether the probate of Wills was originally a matter of exclusive ecclesiastical jurisdiction (*a*). But whatever may have been the case in earlier times, it is certain that, at the time of the passing of the Court of Probate Act (stat. 20 & 21 Vict. c. 77), the Ecclesiastical Court was the only Court in which the validity of Wills of personalty, or of any testamentary paper whatever relating to personalty, could be established or disputed (*b*). An exception to this general rule, however, was to be found in the case of certain Courts Baron that had had probate of Wills time out of mind, and had always continued that usage.

Regularly the Court in which the testament of a deceased person ought to have been proved was the Court of the Ordinary of the place wherein the testator dwelt, *i.e.*, generally speaking the bishop of the diocese.

But if the deceased, at the time of his death, had effects to such an amount as to be considered notable goods, usually called

The Ecclesiastical Court was formerly the only Court in which the validity of a Will of personalty could be established or disputed.

In which of the Ecclesiastical Courts the Will was to be proved.

(*a*) Bac. Abr. Exors. (E.) 1; *Dyke v. Walford*, 5 Moo. P. C. 434.

(*b*) Fonblanq. Treat. on Eq. Pt. 2, c. 1, s. 1, note (*a*); Bac. Abr. Exors. (E.) 1; *post*, Pt. I. Bk. v. Ch. I.; *Gascoyne v. Chandler*, 2 Cas. temp. Lee, 241. See *post*, Pt. I. Bk. iv. Ch. II. § IX. p. 300, as to the general question, of what instruments probate is necessary.

bona notabilia, within some other diocese or peculiar (*c*) than that in which he died, then the Will must have been proved before the Metropolitan of the province by way of special prerogative (*d*): whence the Courts where the validity of such Wills was tried, and the offices where they were registered, were called the Prerogative Courts and the Prerogative Offices of Canterbury and York (*e*).

20 & 21 Vict.
c. 77, s. 3.
Testamentary
and other
jurisdictions
of Eccle-
siastical and
other Courts
abolished.

But by stat. 20 & 21 Vict. c. 77 (intituled *An Act to amend the Law relating to Probates and Letters of Administration in England*), after reciting that "it is expedient that all jurisdiction in relation to the grant and revocation of probates of Wills and letters of administration in England should be exercised in the name of her Majesty in one court," it is enacted by sect. 3, that "the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other courts and persons in England, now having jurisdiction or authority to grant or revoke probate of Wills or letters of administration of the effects of deceased persons, shall, in respect of such matters, absolutely cease; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such court or person."

S. 4. Testa-
mentary
jurisdiction to
be exercised
in the Queen's
name by a
Court of
Probate.

And by sect. 4, "The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of Wills and letters of administration (*f*) of the effects of deceased persons now vested in or which can be exercised by any court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary (*g*), shall belong to and be vested in her Majesty, and

(*c*) "Peculiars" were certain districts exempt from the jurisdiction of the Ordinary of the Diocese in which they lay, and were so called because they had a *peculiar* and special Ordinary of their own.

(*d*) 4 Inst. 335.

(*e*) With regard to the jurisdiction and authority exercised prior to the passing of the Court of Probate Act by the Ecclesiastical Courts, see the earlier editions of this Work: Pt. I. Bk. IV. Ch. I. § 1.

(*f*) By the interpretation clause, sect. 2, "'Will' shall comprehend 'Testament,' and all other testamentary instruments of which probate may now be granted, and 'Administration' shall comprehend all letters of administration of the effects of deceased persons, whether with or without the Will annexed, and whether granted for general, special, or limited purposes."

(*g*) By the interpretation clause, sect. 2, "'Matters and causes testamentary' shall comprehend all matters and causes relating to the grant and revocation of probate of Wills or of administration."

shall, except as hereinafter is mentioned, be exercised in the name of her Majesty in a court to be called the Court of Probate, and to hold its ordinary sittings, and to have its principal registry at such place or places in London and Middlesex as her Majesty in council shall from time to time appoint."

And by sect. 23, "The Court of Probate shall be a Court of Record, and such Court shall have the same powers, and its grants and orders shall have the same effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary, and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which by statute or otherwise are imposed on or should be performed by Ordinaries generally, or on or by the said Prerogative Court, in respect of probates, administrations or matters or causes testamentary within their respective jurisdictions, shall be performed by the Court of Probate; provided that no suits for legacies, or suits for the distribution of residue, shall be entertained by the Court or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished."

S. 23. The Court to have throughout all England the same powers as the Prerogative Court within the province of Canterbury.

Hence it appears that the exclusive jurisdiction in the probate of Wills and granting of administration, which formerly belonged to the Ecclesiastical Courts, was by the aforesaid Act completely and universally throughout England transferred to the newly created Court of Probate.

Court of Probate substituted for the Ecclesiastical Courts universally.

Now by the Supreme Court of Judicature Act, 1873 [which commenced on Nov. 1, 1875], the existing Courts therein named (of which the Court of Probate was one) were united and consolidated together as one Supreme Court of Judicature in England (sect. 3).

36 & 37 Vict. c. 66.

Court of Probate to form a Division of High Court of Justice.

This Supreme Court consists of two Divisions:—

- (1.) "Her Majesty's High Court of Justice," exercising original jurisdiction.
- (2.) "Her Majesty's Court of Appeal," exercising appellate jurisdiction (sect. 4).

The "High Court of Justice" is a Superior Court of Record, and to it is transferred and in it is vested, amongst other jurisdictions, that which was vested or capable of being exercised

Jurisdiction of Court of Probate transferred to High

Court of
Justice.

by the Court of Probate at the commencement of the Act. The jurisdiction so transferred to the High Court includes the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by the judge of the Court of Probate sitting in Court, or Chambers, or elsewhere, when acting as a judge in pursuance of any statute, law, or custom, and all powers given to the Court of Probate or to the judge of that Court by any statute, and also all ministerial powers, duties, and authorities incident to any and every part of the jurisdiction so transferred (sect. 16).

The jurisdiction of the Court of Probate which by the Act was transferred to and vested in the High Court from and after the commencement of the Act, ceased to be exercised except by the "High Court of Justice" as provided by the Act (sect. 22).

Jurisdiction
of Probate
Division:
how exercised
in Procedure
and Practice.

The jurisdiction of the Court of Probate transferred to the "High Court of Justice" is exercised (so far as regards procedure and practice) in the manner provided by the Act or by such Rules and Orders of Court as may be made from time to time pursuant to the Act, and where no special provision is contained in the Act or in any such Rules or Orders of Court with reference thereto, the jurisdiction is exercised as nearly as may be in the same manner as the same might have been exercised in the Court of Probate previously to the commencement of the Act (sect. 23).

The "High Court of Justice" consists of three Divisions, of which one is the "Probate, Divorce, and Admiralty Division" (sect. 31; Order in Council, 16 December, 1880).

Exclusive
jurisdiction
of Probate
Division.

To the "Probate, Divorce, and Admiralty Division" are assigned all causes and matters which would have been within the exclusive cognizance of the Court of Probate if the Act had not passed (sect. 34).

Although all matters which prior to the passing of the Judicature Act would have been within the exclusive cognizance of the Court of Probate are assigned by that Act to the Probate Division of the High Court, still, inasmuch as all judges of the High Court by the powers given to them by that Act have the same jurisdiction, it would seem to follow that any judge, whether of the King's Bench or Chancery Division, may in his discretion exercise jurisdiction in any matter which is assignable to the Probate Division. But although, according to this principle, a judge in the Chancery Division would have jurisdiction to grant probate of a Will, it would appear for many reasons to

be so inconvenient that any judge except a judge in the Probate Division should grant probate, that the judge in the Chancery Division, if requested to exercise such jurisdiction, would use a sound discretion in refusing to do so, and in directing the parties to obtain probate in the Division to which such matters have been assigned. This view that the Chancery Division has jurisdiction, if it thinks fit to exercise it, was adopted by Sir George Jessel, M. R., in the case of *Pinney v. Hunt* (*h*), and followed by Pearson, J., in *Bradford v. Young* (*i*). On the other hand, in the case of *Priestman v. Thomas* (*k*), Sir James Hannen in his judgment is reported to have said: "It is further contended that the plaintiff, if entitled to have the probate of the Will revoked, ought to have claimed it in the action in the Chancery Division. But I am of opinion that he could not properly have done so, as the granting or revoking of probates was within the exclusive cognizance of the Court of Probate, and is therefore now assigned to this Division." And this view seems to have met with the approval of Cotton, L. J., who in his judgment in the same case when before the Court of Appeal (*l*) said, that "The object sought by that action (to wit, a revocation of probate) was not within the jurisdiction of the Chancery Division."

It is to be observed that section 11 of the Judicature Act, 1875, which gives a person, commencing any action or matter in the High Court, liberty (subject to the Rules of Court and the provisions in the Judicature Acts, and to the power of transfer) to assign the action to one of the Divisions of the High Court "as he may think fit," goes on to provide that if he assign the action to a Division to which, according to the Rules of Court or the provisions of the Acts, it ought not to be assigned to, a judge of such Division, even though application is made to him to direct a transfer of the action or matter to the Division to which it ought to have been assigned, may retain the same, if he think it expedient so to do, in the Division in which it was commenced. The section further provides that (subject to the Rules of Court) a person commencing any cause or matter shall not assign the same to the Probate, Divorce and Admiralty Division, unless he would have been entitled to commence the same in the Court of Probate, or in the Court for Divorce and Matrimonial Causes, or in the High Court of Admiralty, if the

38 & 39 Vict.
c. 77, s. 11.

(*h*) 6 C. D. 98.

(*k*) 9 P. D. 70, 210.

(*i*) 26 Ch. D. 656.

(*l*) *Ibid.* 210, 214.

Judicature Act had not been passed. It will be noticed that the section is silent as to the converse proposition, viz., the commencing, in a Division other than the Probate Division, of an action or matter which, before the Judicature Acts, would have been commenced in the Court of Probate, and in that Court alone; and it may reasonably be inferred that the Act advisedly left open such a course of procedure, while specifically forbidding a person to commence an action or cause in the Probate Division, of such a nature as would not have come within the exclusive jurisdiction of the Court of Probate in former days.

The executor cannot rely on his title in any Court without the production of the probate.

The Probate.

The practical consequence is, that an executor cannot assert or rely on his right in any Court without showing that he has previously established it in the Probate Division: the usual proof of which is, the production of a copy of the Will by which he is appointed, certified under the seal of the Court. This is usually called the probate, or the letters testamentary. In other words, nothing but the probate, (or letters of administration with the Will annexed, when no executor is therein appointed, or the appointment of executor fails,) or other proof tantamount thereto of the admission of the Will in the Probate Division is legal evidence of the Will in any question respecting personalty (*m*). The Will of a deceased Sovereign of the realm is no exception to this rule, notwithstanding (as it has already appeared (*n*)) no probate of such a Will can be granted by the Court. In the case of any claim under a Sovereign's Will the proper course is to proceed by petition of right (*o*).

As regards real estate in the case of the Will of a person dying after the commencement of the Land Transfer Act, 1897 (1st January, 1898), by sect. 1, sub-sect. (3) of that Act "Probate and Letters of Administration may be granted in respect of real estate only, although there is no personal estate." By sub-section 4 the expression real estate in that part of the Act is not to be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title

(*m*) If a Will be made in a foreign country, and proved there, disposing of goods in England, the executor cannot have action on such probate, but ought to prove the Will here: *Lee v. Moore*, Palm. 165; *Tourton v. Flower*, 3 P. Wms. 370. And see *Haas v. Atlas Assurance Company, Ltd.*, [1913] 2 K. B. 209 at p. 216. See *post*, Pt. I. Bk. IV. Ch. II. § VI.

(*n*) *Ante*, pp. 10, 11.

(*o*) *Ryves v. Duke of Wellington*, 9 Beav. 579.

of a purchaser from the customary tenant (*p*). Having regard to the provisions of this Act, and of the Finance Act, 1894, it would seem that a Will of a person dying after the commencement of the Land Transfer Act, 1897, disposing of real estate only and not appointing an executor, should now be proved in the Probate Division (*q*).

The probate is, however, merely operative as the authenticated evidence, and not at all as the foundation, of the executor's title: for he derives all his interest from the Will itself, and the property of the deceased vests in him from the moment of the testator's death (*r*). Hence the probate, when produced, is said to have relation to the time of the testator's death (*s*).
An executor derives his title from the Will and not the probate: relation of the probate to the testator's death.

It should further be observed that a Court of Equity considers an executor as having a fiduciary capacity as regards the legatees in respect to their legacies, and in certain cases as regards the next of kin in respect of the undisposed-of surplus, and, since the Land Transfer Act, 1897, as regards also devisees or the heir-at-law in respect of the real estate, and will compel the executor to perform his testamentary duties with propriety. Hence, although in those Courts, as well as in Courts of Law, the seal of the Court of Probate is conclusive evidence of the *factum* of a Will (*t*), an equitable jurisdiction has arisen of *construing* the Will, in order to enforce a proper performance of the duties of the executor and the trusts of the Will. The Courts of Equity are consequently sometimes called Courts of Construction, in contradistinction to the Court of Probate.
Courts of Equity are Courts of construction of Wills:

It should be observed, that as long as the Ecclesiastical Courts

and so were the Ecclesiastical Courts:

(*p*) It includes equitable estates in land of copyhold tenure or customary freehold: *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(*q*) Cf. observations of Sir James Hannen, *In the goods of Gunn*, 9 P. D. 244, *post*, p. 232, n. (*k*). By sect. 64 of 20 & 21 Vict. c. 77, in suits to establish a devise or other testamentary disposition of or affecting real estate, on notice to the opposite party as provided by the Act to give the same in evidence, the probate or letters of administration with the Will annexed or a copy thereof respectively, shall be sufficient evidence of the Will and of its validity and contents, unless the party receiving such notice shall give notice that he disputes the validity of such devise or other testamentary disposition. It would seem, however, now that as to Wills of persons dying after the 1st Dec. 1897, there is no distinction between real and personal estate as to proof of title.

(*r*) *Smith v. Milles*, 1 T. R. 475, 480; *Comber's Case*, 1 P. Wms. 766; *Woolley v. Clark*, 5 B. & A. 744.

(*s*) Wentw. Off. Ex. 115, 14th edit.; *Whitehead v. Taylor*, 10 A. & E. 210; *Ingle v. Richards*, 28 Beav. 366.

(*t*) See *post*, Pt. I. Bk. vi. Ch. I.

had the exclusive testamentary jurisdiction, they were also Courts of Construction as well as Courts of Probate, because suits for legacies might have been brought therein. Indeed, the cognizance of legacies in former times belonged exclusively to the ecclesiastical jurisdiction; for the Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (*u*). But the Court of Probate was not a Court of Construction; for, as it has already appeared (*v*), the 23rd section of the Act by which it was created expressly prohibited it from entertaining any such suit. The same observations would seem to apply to the Probate Division of the High Court of Justice, for by sect. 34 of the Judicature Act, 1873, all causes and matters which would have been within the exclusive cognizance of the Court of Probate are assigned to the Probate Division of the High Court, and by the same section all causes and matters "for the administration of the estates of deceased persons," and for "the execution of trusts charitable or private" are assigned to the Chancery Division of the High Court. And by sect. 11 (sub-s. 3) of the Judicature Act of 1875, it was enacted that, subject to rules of Court, a person commencing any cause or matter shall not assign the same to the Probate Division, unless he would have been entitled to commence the same in the Court of Probate. And although the Probate Division, as a Division of the High Court of Justice, has jurisdiction to determine, as far as possible, all questions in controversy between the parties to any cause or matter pending before it (*w*), it has been held that the Court is still, in practice, not a Court of Construction, and will, generally speaking, only construe testamentary documents so far as is necessary in order to determine whether or not the document in question should be admitted to probate and to whom the grant should be made (*x*).

By section 24 of the Court of Probate Act, "The Court of Probate may require the attendance of any party in person,

(*u*) *Deeks v. Strutt*, 5 T. R. 690, 692.

(*v*) *Ante*, p. 203; and see *Warren v. Kelson*, 1 S. & T. 290.

(*w*) Judicature Act, 1873, s. 24 (7). See, as to the conditions under which this jurisdiction will be exercised, *In the goods of Tharp*, L. R. 3 P. D. 76; *Betts v. Doughty*, L. R. 5 P. D. 26; *In the goods of Marchant*, [1893] P. 254; *Stone v. Hoskins*, [1905] P. 194.

(*x*) *Re Heys, Walker v. Gaskell*, [1914] P. 192, 200; and see *In the estate of Lupton*, [1905] P. 321.

but the Court
of Probate
was not :

nor is the Pro-
bate Division
of the High
Court of
Justice.

38 & 39 Vict.
c. 77 s. 11
(sub-s. 3).

20 & 21 Vict.
c. 77, s. 24.
Power of
Court of

or of any person whom it may think fit to examine on cause to be examined in any suit or other proceeding in respect of matters, or causes testamentary (*y*), and may examine, or cause to be examined, upon oath or affirmation, as the case may require, parties and witnesses by word of mouth; and may either before or after, or with or without such examination, cause them or any of them to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and the Court may by writs require such attendance, and order to be produced before itself or otherwise any deeds, evidences, or writings, in the same form, as nearly as may be, as that in which a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, is now issued by any of her Majesty's Superior Courts of Law at *Westminster*; and every person disobeying any such writ shall be considered as in contempt of Court, and also be liable to forfeit a sum not exceeding one hundred pounds."

Probate to
examine
witnesses.

As to pro-
duction of
deeds, &c.

By section 25, "The Court of Probate shall have the like powers, jurisdiction and authority, for enforcing the attendance of persons required by it as aforesaid; and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments, made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the Orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court."

Sect. 25.

Power of the
Court to en-
force orders.

By stat. 21 & 22 Vict. c. 95, s. 17, "The Judge of the Court of Probate shall have and exercise the same power of altering and amending grants of probate and letters of administration, made before January 11, 1858 (*z*), as any Ecclesiastical Court had and exercised in respect of such grants."

21 & 22 Vict.
c. 95, s. 17.

Judge of the
Court of Pro-
bate may
amend grants
made before
Jan. 11, 1858.

(*y*) Where an executor was desirous to propound in solemn form the last Will of his testator, and cited certain next of kin, but was unable to ascertain what other persons were entitled in the distribution, the Court, under this section, ordered a *subpœna* to issue for the attendance of certain persons, to be examined as to their knowledge of the members of the family and the other next of kin of the deceased: *Shepherd v. Beetham*, L. R. 2 P. & D. 384; *In the goods of Sweet*, [1891] P. 400; *In the estate of Bays*, 54 S. J. 200.

(*z*) The day when the Court of Probate Act, 1857, came into operation.

Cases of grants void or voidable made before the Probate Act.

In order to meet the case of grants made before the Act, which were void or voidable by reason of the Courts not having jurisdiction (a), and also of grants which, though not void or voidable, were not sufficiently extensive by reason of not reaching property situate out of the jurisdiction of the Court that made the grant, provision is made by sections 86, 87 and 88 of the Probate Act, 1857 (20 & 21 Vict. c. 77).

21 & 22 Vict. c. 95, s. 20. Second and subsequent grants to be made where the original Will or the original letters of administration are deposited.

By stat. 21 & 22 Vict. c. 95, s. 20, "All second and subsequent grants of probate or letters of administration shall be made in the Principal Registry, or in the District Registry where the original Will is registered or the original grant of letters of administration has been made, or in the District Registry to which the original Will or a registered copy thereof, or the record of the original grant of administration, have been transmitted by virtue of a requisition issued in pursuance of section eighty-nine of 'The Court of Probate Act,' and for and in respect of such second or subsequent grants of probate or letters of administration to be made in a district registry, it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made."

Stat. 21 & 22 Vict. c. 95, s. 10.

Jurisdiction of County Courts in contentious business.

By stat. 21 & 22 Vict. c. 95, s. 10, it is enacted that where "it appears by affidavit to the satisfaction of a registrar of the principal registry, that the testator or intestate, in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for, had at the time of his death his fixed place of abode in one of the districts specified in Schedule (A.) to the said 'Court of Probate Act' (b), and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of 200*l.*, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of 300*l.* or upwards (c), the judge of the County Court having jurisdiction

(a) See *ante*, p. 202.

(b) *I.e.*, in the district of a district registry.

(c) *I.e.*, the actual value of the property free from mortgages or other charges: *Davies v. Brecknell*, L. R. 2 P. & D. 177. See *Thomas v. Nurse*, 30 L. J. P. & M. 80.

in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the Will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

It is not obligatory in such cases to apply through the County Court for probate or administration, since the above jurisdiction is concurrent with that of the Probate Division and not exclusive, but the Probate Division has power in cases where, in any contentious business arising out of an application for probate or administration, it is shown that the state of property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, to send the cause to such County Court, and the judge of such County Court shall proceed therein as if such application and cause had been made to, and arisen in, his Court in the first instance (d).

Sections 55, 56, 57 and 59 of the Probate Act, 1857 (20 & 21 Vict. c. 77), and sects. 10, 12 and 13 of the amending Act (stat. 21 & 22 Vict. c. 95), relate to the jurisdiction of County Courts in contentious business. The rules of practice regulating applications in respect of such contentious business in County Courts are contained in Order XLIX. of the County Court Rules, and it is provided by rule 12 of this Order that in proceedings under this Order, for which no Rules are thereby provided, the Rules and practice of the High Court shall be followed as far as they are applicable.

By sect. 58 of the Probate Act, 1857, it is enacted, that "any party who shall be dissatisfied with the determination of the judge of the County Court in point of law or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate in such manner and subject to such regulations as may be provided by the Rules and Orders to be made under this

County Court jurisdiction concurrent with that of the Probate Division, but the latter has power to remit to County Court.

Stat. 20 & 21 Vict. c. 77, ss. 55, 56, 57, and 59.

Stat. 21 & 22 Vict. c. 95, ss. 10, 12, and 13.

County Court Rules, Ord. XLIX.

Stat. 20 & 21 Vict. c. 77, s. 58.

Appeals from County Court:

(d) See 20 & 21 Vict. c. 77, s. 59, extended to applications for the revocation of a grant of probate or administration by 21 & 22 Vict. c. 95, s. 12. And see also *Slater v. Alvey*, L. R. 2 P. & D. 154. As to the discretion of the Court to direct a trial of a probate cause in the County Court against the wish of all parties, see *Dunn v. Dunn*, 1 Sw. & Tr. 521; and *Bull v. Bull*, 30 L. J. P. & M. 40, n. As to the effect on the jurisdiction of the High Court of the transference of a testamentary cause to the County Court, see *Norris v. Allen*, 2 S. & T. 601; *Zealley v. Veryard*, L. R. 1 P. & D. 195; *Macleur v. Macleaur*, *ib.* 604.

Act, and the decisions of the Court of Probate on such appeal shall be final" (c).

to Divisional
Court.
R. S. C.
Ord. LIX.
r. 4.

The appeal from the County Court under this section is now to a Divisional Court of the Probate, Divorce and Admiralty Division of the High Court of Justice. (R. S. C., Order LIX. rule 4.)

Jurisdiction
of County
Courts in non-
contentious
business.
Stat. 36 & 37
Vict. c. 52,
s. 1:

As to the Probate Jurisdiction of County Courts in *non-contentious* business, it is enacted by stat. 36 & 37 Vict. c. 52, that—

"Where the whole estate and effects of an intestate shall not exceed in value the sum of 100*l.*, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the Registry of the Court of Probate having jurisdiction in the matter, may apply to the Registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said Registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the Registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said Registrar of the County Court, to be by him delivered to the party so applying for the same, without the payment of any fee for the same, save as is provided by this Act" (sect. 1).

s. 2:

"The Registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant" (sect. 2).

s. 3:

"If the Registrar of the County Court has reason to believe that the whole estate and effects of which the deceased died possessed exceeds in value 100*l.*, he shall refuse to proceed with the application until he is satisfied as to the real value thereof" (sect. 3).

(c) And see *Zealley v. Veryard*, L. R. 1 P. & D. 195; *Macleur v. Macleure*, L. R. 1 P. & D. 604. See also *Copeland v. Simister*, [1893] P. 16.

By sect. 4, Registrars of County Courts may exercise the powers of Commissioners of the Court of Probate. s. 4.

The Act of 1875 (stat. 38 & 39 Vict. c. 27), which is to be read and construed along with and as part of the above recited Act (sect. 2), extends the provisions of the above Act to the surviving children of poor *widows* who die intestate (sect. 1). Stat. 38 & 39
Vict. c. 27.
Extension of
former Act.

By the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 33, as amended by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16, special provisions are made as to obtaining probate or letters of administration in cases where the gross value of the property real and personal does not exceed 500*l.*; and officers of Inland Revenue are given powers similar to those conferred on the Registrar of the County Court by the Acts previously referred to. Stat. 44 Vict.
c. 12.
Provisions as
to obtaining
probate, &c.,
where the
gross value of
estate does
not exceed
500*l.*

SECTION II.

What the Executor may do before Probate.

✓ Upon the principles stated in the course of the preceding section (*d*), it has been held that the executor, before he proves the Will, may do almost all the acts which are incident to his office, except only some of those which relate to suits (*e*). ✓ Thus he may seize and take into his hands any of the testator's effects (*f*), and he may enter peaceably into the house of the heir, for that purpose, and to take specialties and other securities for the debts due to the deceased (*g*). He may pay, or take releases of, debts owing from the estate (*h*); and he may receive or release debts which are owing to it (*i*); and distrain for rent due to the testator (*k*). And if, before probate, the day occur for payment upon bond made by, or to, the testator, payment must be made to, or by, the executor, though the Will be not proved, upon like penalty, as if it were (*l*). So What execu-
tor may do
before
probate.

(*d*) *Ante*, p. 207.

(*e*) Godolph. Pt. 2, c. 20, s. 1; Wentw. Off. Ex. 81, 14th edit.; Treat. on Eq. B. 4, Pt. 2, c. 1, s. 2; *Wankford v. Wankford*, 1 Salk. 301; *Humphreys v. Ingledon*, 1 P. Wms. 753.

(*f*) Godolph. Pt. 2, c. 20, s. 1; Wentw. Off. Ex. 81, 14th edit.

(*g*) Godolph. Pt. 2, c. 20, s. 3; Wentw. Off. Ex. 81, 14th edit.

(*h*) *Ibid*.

(*i*) Co. Litt. 292, *b*; *Graysbrook v. Fox*, Plowd. 281; *Middleton's Case*, 5 Co. 28, *a*; Godolph. Pt. 2, c. 20, s. 1; Wentw. Off. Ex. 81, 14th edit.; *Wankford v. Wankford*, 1 Salk. 306, 307; *Wills v. Rich*, 2 Atk. 285; *Re Stevens*, [1897] 1 Ch. 422, 430.

(*k*) *Whitehead v. Taylor*, 10 A. & E. 210.

(*l*) Godolph. Pt. 2, c. 2, s. 3; Wentw. Off. Ex. 18, 14th edit. The

he may sell, give away (*m*), or otherwise dispose, at his discretion, of the goods and chattels of the testator, before probate (*n*); he may assent to, or pay, legacies (*o*); he may enter on the testator's terms for years (*p*), and he may gain a settlement by residing in the parish where the land lies (*q*). As regards his power to deal before probate with the testator's real estate, since the Land Transfer Act, 1897, all enactments and rules of law relating to dealing with chattels real before probate or administration apply equally to real estate (*r*).

These acts stand good, though he die without proving the Will.

And although the executor should die, after any of these acts done, without proving the Will, yet do these acts so done stand firm and good (*s*). Where a termor devised his term to another whom he made his executor and died; and the devisee entered and died without any probate; it was held that the term was legally vested in the executor by his entry, and an execution of the devise, without any probate (*t*). So if an executor assents to a legacy, and dies before probate, yet the assent is good enough (*u*). So all payments made to him are good, and shall not be defeated, though he dies and never proves the Will (*v*). In a word, the executor's not

penalty is now saved by bringing the principal and interest and costs into Court, under stat. 4 Ann. c. 3, 16, Ruff. § 13.

(*m*) The words in the text are taken from Wentw. Off. Ex. 18. The words in Godolph. are: "Also an executor may before probate give or sell any of the goods and chattels of the testator not otherwise bequeathed in the Will, and for the same may maintain his action." Inasmuch as under the existing law the executor is not entitled to the undisposed-of residue beneficially (see *post*, p. 1216), he is not now entitled to give away the goods and chattels of the testator, though undisposed of by the Will.

(*n*) Godolph. Pt. 2, c. 20, s. 3; Wentw. Off. Ex. 82, 14th edit. He may release or assign any part of the personal estate before probate: By Lord Macclesfield, 1 P. Wms. 768, *Comber's Case*. It is consequently no objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment: *Elwood v. Christy*, 17 O. B. N. S. 754.

(*o*) Godolph. Pt. 2, c. 29, s. 1; Wentw. Off. Ex. 82, 14th edit.

(*p*) *Rex v. Stone*, 6 T. R. 298; Dyer, 367, *a*. And the executor of the grantee of the next avoidance of a church may grant the advowson before probate: *Smithley v. Chomeley*, Dyer, 135, *a*.

(*q*) *Rex v. Stone*, 6 T. R. 295.

(*r*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2).

(*s*) Wentw. Off. Ex. 82, 14th edit; *Brazier v. Hudson*, 8 Sim. 67.

(*t*) Dyer, 367, *a*; *Rex v. Stone*, 6 T. R. 298; *Fenton v. Clegg*, 9 Exch. 680.

(*u*) *Johnson v. Warwick*, 17 C. B. 516.

(*v*) *Wankford v. Wankford*, 1 Salk. 306, 507.

proving the Will does, upon his death, determine the executorship, but not avoid it (x).

It must, however, be carefully observed in this place, that although an executor may, before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to show the right to make the assignment or give the assent; which can only be effected by producing the probate, or other evidence of the admission of the Will in the Court: for, as it has already appeared, the fact of a particular person having been appointed executor to another can be proved by no other means, either in Courts of Law or Equity (y). If the executor died after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead (z).

If acts done by an executor before probate are relied on for title or sought to be enforced, a subsequent probate must be shown.

Again, although an executor can, before probate, make an assignment and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because, till the evidence of title exists, the executor cannot give a complete indemnity (a).

An executor cannot maintain actions before probate unless such as are founded on his *actual* possession: for in actions where he sues in his representative character, he may be compelled, by the course of pleading, to produce the letters testamentary at the trial, or in some cases, by an application to the Court, at an earlier stage of the cause (b); and in those actions

He cannot maintain actions before probate:

(x) By Lord Holt, in *Wankford v. Wankford*, 1 Salk. 309. *Quære*, whether, when a debtor makes his creditor his executor, who dies after having intermeddled with his goods, but before probate, and before any election made to retain, the executor of the executor may retain. See *Croft v. Pyke*, 3 P. Wms. 182, and *post*, Pt. III. Bk. II. Ch. II. § VI.

(y) See *ante*, p. 206.

(z) *Johnson v. Warwick*, 17 C. B. 516.

(a) *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583; and see *In re Stevens*, *Cooke v. Stevens*, [1897] 1 Ch. 422, at p. 430.

(b) *Webb v. Adkins*, 14 C. B. 401. This case was approved and followed in *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294, where a testatrix having endorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the Will was granted, issued a writ against the bankers for the return of the bill or its value. The bankers were always willing to pay over the proceeds of the bill to the executors upon production of probate. Upon the defen-

where he sues in his individual capacity, relying on his *constructive* possession as executor, although he does not name himself as executor in his declaration, nor make any profert, yet, generally speaking, it will be necessary for him to prove himself executor at the trial (c), which he can only do by showing the probate. For example, where an executor brings trespass *de bonis asportatis*, or trover, upon his testator's possession, and a conversion in his lifetime, he necessarily describes himself as executor in his declaration, and his character as such may be traversed: And where the goods were taken or converted after the testator's death, although, since the property in the goods draws to it a possession in law, he might formerly have declared on this *constructive* possession of his own, notwithstanding he had never had actual possession, without naming himself executor, still, if his title to the property were put in issue by the pleadings, he had to show that title as executor at the trial by producing the probate, in order to prove his constructive possession (d). And now, by Order III. rule 4, R. S. C. 1883, if the plaintiff sues in a representative capacity, the indorsement of claim on the writ of summons must show in what capacity he sues.

except where
he has had
actual pos-
session:

In cases, indeed, where the executor has *actually* been possessed of the property which is the subject of the action, before it came to the hands of the defendant, such possession is, according to the general principle, of itself sufficient, without showing any title, to establish a *primâ facie* case, either in replevin, trover or trespass, when the property has come to the defendant's hands, or been converted, by tort (e), or in debt or assumpsit, when the defendant has acquired it by a contract with the executor (f). In such case it is evident that the actual possession of the plaintiff is a *primâ facie* title, without reference to the circumstances under which such possession has

dants taking out a summons for an order that all proceedings in the action should be stayed on the ground that the same was frivolous, vexatious, and an abuse of the process of the Court, it was held that all proceedings in the action ought to be stayed until the plaintiffs obtained probate.

(c) *Blainfield v. March*, 7 Mod. 141, by Holt, C. J.; 2 Saund. 47, z, note to *Wilbraham v. Snow*.

(d) *Hunt v. Stevens*, 3 Taunt. 113. And any defect in the probate, e.g., the want of a proper stamp, will be as fatal as the non-production: *Ibid*.

(e) Wentw. Off. Ex. 84, 14th edit.; Plowd. 281, in *Graysbrook v. Fox*. See *Elliott v. Kemp*, 7 M. & W. 306, 312, 314.

(f) Wentw. Off. Ex. 84, 85, 14th edit.

been obtained, whether as executor or by any other means (*g*). Accordingly, in the case of *Oughton v. Seppings* (*h*), a sheriff's officer had seized and sold a pony, claimed by the plaintiff, a widow, under an execution against a third party, who lodged with her: The action was brought against the officer for money had and received, to recover the amount of the sale money: It appeared that the pony had been bought by the lodger for the plaintiff with money provided by her, but at that time, and for several months afterwards, her husband was alive: After his death, however, the plaintiff fed the pony, and paid bills for its hay and shoeing, though it was used as generally by the lodger as by her: No probate of Will or letters of administration were produced: It was objected, that assuming even that the plaintiff might have maintained trespass for the taking of the pony, she could not maintain this action, which was founded on a contract; and that the pony having been the property of the husband, passed on his death to his personal representative, and it had not been shown that the plaintiff was either executrix or administratrix. But it was held that there was evidence, though perhaps slight, that the plaintiff was in possession of the pony at the time it was seized; and if so, since she might clearly have maintained trespass against a wrong-doer, she might waive the tort, and maintain this action to recover the money produced by the sale (*i*).

And the law is the same with respect to the grantee of the executor. Accordingly, in an action of trover for a horse and gig, which the plaintiff claimed as the vendee of an executor, it was held, that as at the time of the trial the Ecclesiastical Court had not granted probate, and the executor had never had actual exclusive possession of the gig and horse, the plaintiff could not make out his title, though he produced the Will appointing his

nor can his
grantee:

(*g*) On this principle, in a case where three out of four executors made a sale of the goods of their testator, it was held that the three might sue without naming themselves executors, and without joining the fourth executor; although the goods were sold as the goods of the testator: *Brassington v. Ault*, 2 Bing. 177. The distinction above pointed out might seem unnecessarily laboured in the present Treatise, had it not been laid down in previous works on the same subject as an absolute proposition that an executor may *maintain* actions of trespass or trover, before probate, for such of the effects of the testator as never came to his actual possession, taken or converted after the testator's decease. See Toller, 47; 2 Roberts. on Wills, 172, 173.

(*h*) 1 B. & Ad. 241.

(*i*) See also accord., *White v. Mullett*, 6 Exch. 713, 715. And see further *Waller v. Drakeford*, 1 E. & B. 749.

vendor executor (*k*). In this case, the plaintiff and defendant both claimed title to the property; and Lord Tenterden, in his address to the jury, observed, that if the plaintiff had proved a clear and undisputed possession, it might have been sufficient; but it appeared that the defendant, before and after the sale to the plaintiff, used the gig and horse.

but he may
commence an
action before
probate:

But although an executor cannot *maintain* actions before probate, except upon his actual possession, yet he may advance in them as far as that step where the production of the probate becomes necessary, and it will be sufficient if he obtains the probate in time for that exigency (*l*). Thus where he sues as executor, he may *commence* the action before probate (*m*): for, as it has been before observed, the probate, although obtained after action brought, shall, when produced, have relation to the death of the testator, so as to perfect and consummate the Will from that period (*n*). So where a reversion of a term comes to him, he may avow before probate for such rent as hath accrued after the death of the testator (*o*), and if such an issue is joined that it becomes necessary for him to prove his title by executorship (as, for instance, if *non tenuit* should be pleaded), it will be sufficient if he obtains probate in time to produce it in evidence at the trial.

he may com-
mence action

So an executor, before probate, may commence an action in

(*k*) *Pinney v. Pinney*, 8 B. & C. 335.

(*l*) *Wills v. Rich*, 2 Atk. 285; *Easton v. Carter*, 5 Exch. 8, 14. The Court may, however, make an order compelling him to produce the probate upon which he founds his right to maintain the action or stay proceedings until he places himself in a situation to do so: *Webb v. Adkins*, 14 C. B. 401; *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294.

(*m*) 1 Roll. Abr. 917, A. 2; *Martin v. Fuller*, Comb. 871; *Wankford v. Wankford*, 1 Salk. 302, 303; *Webb v. Adkins*, 14 C. B. 401. But in cases where the defendant does not dispute his liability or the title of the executors to probate, but merely requires production of the probate before paying the executor, the executor ought not to sue, and the Court will stay the action if he does. See *Tarn v. Commercial Bank of Sydney*, 12 Q. B. D. 294.

(*n*) Plowden, 281; 1 Roll. Abr. 917, A. 2.

(*o*) *Wankford v. Wankford*, 1 Salk. 307, per Holt, C. J.; *Whitehead v. Taylor*, 10 A. & E. 210. It is said an executor may maintain a *quare impedit*, if he be entitled to the next presentation of a church, which has become void, without showing forth the Will: Wentw. Off. Ex. 84, 14th edit. But if by the course of the pleadings it should become a part of his case to prove his title, he certainly can only do so by producing the probate; and it may be doubtful whether the passage above cited is, in any case, law, inasmuch as it would seem that executors must show their title in the declaration in *quare impedit*.

the Chancery Division (the bill, however, formerly, it was said, must allege that he has proved the Will) (*p*), and the subsequent probate makes the action a good one, if obtained at any time before hearing (*q*).

An executor can be a petitioning creditor in bankruptcy, but he must obtain probate before he can get a receiving order (*r*).

It would seem also that the executor of a creditor of a company may present a winding-up petition under the Companies Act before he has obtained probate: it being sufficient if he has obtained probate before the hearing of the petition (*s*).

On the other hand, if he have elected to administer, he may also, before probate, be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible (*t*). So an action may be commenced against an executor, before probate, by a residuary legatee, for an account of the estate and effects of the testator, and to have the assets

(*p*) *Humphreys v. Ingledon*, 1 P. Wms. 753. It seems, however, that an executor may, pending an application for probate, bring an action to protect the estate, by obtaining an injunction or otherwise, although he alleges in the statement of claim that he has not yet obtained probate. See *Newton v. Metropolitan Railway*, 1 Dr. & Sm. 583, *infra*, note (*q*).

(*q*) *Humphreys v. Humphreys*, 3 P. Wms. 351. And in the case of *Patten, Executrix, v. Panton*, in the Exchequer, 1793, it was said, *arguendo*, that it had been determined by that Court about three years ago, that it is sufficient if the probate were obtained at any time before hearing: 3 Bac. Abr. 53, by Gwillim, Executors (E.) 14. But a plea that the executor has not obtained probate was allowed, on the ground that the cause must be considered as having come on to be heard: *Simons v. Milman*, 2 Sim. 241. See also *Jones v. Howells*, 2 Hare, 353, per Wigram, V.-C.; *post*, Pt. v. Bk. i. Ch. ii. In *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583, a bill by executors for a specific performance alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given, and at that time when the motion, but for the press of business, would have been heard, there was no probate: but when the motion was actually heard, the probate was in Court; and it was held by Sir R. Kindersley, V.-C., that the defendants could not resist the motion upon the ground of demurrer. See also *Beardmore v. Gregory*, 34 L. J. Ch. 392.

(*r*) See *Ex parte Paddy*, 3 Madd. 241; *Rogers v. James*, 7 Taunt. 147, cases decided under the old Bankruptcy Acts.

(*s*) *Re Masonic & General Life Assurance Co.*, 32 O. D. 373.

(*t*) Wentw. Off. Ex. 86, 87, 14th edit.; Plowd. 280; Toller, 49. It is clear upon the grounds which have already been stated (see p. 194), that if he has administered, he will be liable, not only before probate, but though he should refuse to take probate, and administration should be committed to another. See the observations of Best, C. J., in *Douglas v. Forest*, 4 Bingh. 704.

in Chancery Division before probate:

he may be petitioning creditor in bankruptcy before probate. and may present winding-up petition:

he may be sued before probate.

secured (*u*). So, before probate, an executor may be compelled to discover the personal estate of his testator, though a suit be pending respecting the validity of the Will (*x*). But a creditor of a deceased debtor cannot sue a person named as executor in the Will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the Will and consequently the seizure and sale of part of the testator's assets, under an execution founded upon a judgment in a suit so constituted, was ineffectual to bind the testator's estate (*y*).

If he die before probate, his executor shall not be executor to the first testator.

If an executor die before probate, although, as already mentioned, the acts which he may legally do before probate stand firm and good, yet his executor may not prove both Wills, and so become executor to both the testators' (*z*). But administration of the goods of the first testator, with the Will annexed to it, is to be committed to the executor of the executor, if the first executor is residuary legatee of the first testator; or if he is not, then to such other person as may be the residuary legatee; otherwise to the next of kin of the first testator' (*a*).

(*u*) *Blewitt v. Blewitt*, 1 Younge, 41; *In re Stevens, Cooke v. Stevens*, [1897] 1 Ch. 422.

(*x*) *Dulwich College v. Johnson*, 2 Vern. 49. See also *Phipps v. Steward*, 1 Atk. 285; Fonbl. Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 2, n. 6. Since the passing of the Judicature Acts, actions for the sole purpose of obtaining discovery have become very rare.

(*y*) *Mohamidu Mohideen Hadjar v. Pitchey*, [1894] A. C. 437.

(*z*) *Wankford v. Wankford*, 1 Salk. 308, in Lord Holt's judgment: *S. C.*, 1 Freem. 520.

(*a*) *Isted v. Stanley*, Dyer, 372, *a*; Wentw. Off. Ex. 82, 14th edit.; Godolph. Pt. 1, c. 20, s. 2. See *post*, Pt. I. Bk. v. Ch. III. § 1.

CHAPTER THE SECOND.

THE MANNER OF OBTAINING PROBATE AND THE PRACTICE OF
THE COURT WITH RESPECT THERETO.

SECTION I.

*By whom the Will should be proved: and herewith of the
Production and Deposit of Testamentary Papers.*

THE only person by whom the testament can be proved is the executor named in it (*a*), whom (as before stated) the Court may cite to the intent to prove the testament, and take upon him the execution thereof, or else to refuse the same (*b*). This may the Court do, not only *ex officio*, but at the instance of any party having an interest, which interest is proved by the oath of the party.

Executor
alone can
prove Will.

The executor
may be cited
to prove.

A citation answers two purposes: it either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it, the process provides a substitute for a voluntary renunciation on their part. Availing himself, therefore, of the rule, a person having an inferior interest, but unable to procure the renunciation of the persons who have the superior interest, cites all those persons who have such superiority to take the required grant, or show cause why it should not be made to himself.

Citation,
purpose of.

Thus in the case of a Will, the residuary legatee, or residuary devisee if there is real estate, cites the executor to accept or refuse probate of the Will, or to show cause why letters of administration with the Will annexed, of all the estate which by law devolves to and vests in the personal representative of the deceased, should not be granted to him (the residuary legatee or residuary devisee) (*c*).

(*a*) *Wankford v. Wankford*, 1 Salk. 309.

(*b*) Swinb. Pt. 6, s. 12, pl. 1; Godolph. Pt. 1, c. 20, s. 2; *ante*, p. 197.

(*c*) For forms of citation, see Tristram & Coote's Prob. Prac. 15th edit. p. 833; Mortimer on Probate, pp. 1037—1051.

A legatee or a creditor (*d*) similarly cites both the executor and the residuary legatees and residuary devisees, if there is real estate, or the testator's next of kin and heir-at-law if the residue has not been disposed of.

Before any citation can issue in respect of a Will, that Will must have been filed. The party citing must therefore have previously obtained possession of the Will or had it filed (*e*).

20 & 21 Vict.
c. 77, s. 26.
Order to
produce any
instrument
purporting to
be testamen-
tary.

By the Court of Probate Act, 1857, s. 26, "The Court of Probate may, on motion or petition, or otherwise in a summary way (*f*), whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court (*g*), or upon interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories, and if so ordered, to

(*d*) A creditor may cite the next of kin to accept administration though his right of action is barred by the Statute of Limitations: *In the goods of Coombs*, L. R. 1 P. & D. 193; and see *Coombs v. Coombs*, *ibid.* 288.

(*e*) Mortimer on Probate, p. 532.

(*f*) These orders are now made on motion: see Probate Rules (Contentious), r. 73.

(*g*) See *In the goods of Shepherd*, [1891] P. 323. The examination of a person respecting his knowledge of testamentary papers under this section must be either in open Court or on interrogatories, so there is no power to order his examination before the Registrar of the district where he resides: *In the goods of Laws*, L. R. 2 P. & D. 458. But if he be proved by affidavit to be unable from illness to attend to be examined in open Court, the Court has power under this section to order his attendance to be examined *vivâ voce* before a commissioner: *Banfield v. Pickard*, 6 P. D. 33. The person required to attend is entitled to conduct money: *In the estate of Harvey*, [1907] P. 239, overruling *In the goods of Wyatt*, [1898] P. 15; and can claim to be represented by counsel: *In the goods of Cope*, 36 L. J. P. & M. 83. The Court will not under this section order the attendance for examination in open Court by way of preliminary proceeding and with the object of ascertaining whether there is any case of resisting probate of the Will, of the attesting witnesses to a Will, because they may have declined to give information as to the circumstances attending the execution of the same: *Evans v. Jones*, 36 L. J. P. & M. 70; and *vide ante*, p. 209, note (*y*).

produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default; and the costs of any such motion, petition, or other proceeding (*h*), shall be in the discretion of the Court."

Further, by stat. 21 & 22 Vict. c. 95, s. 23, it is enacted that "It shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpoena requiring any person to produce and bring into the principal or any district registry, or otherwise as in the said subpoena may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpoena, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing" (*i*).

21 & 22 Vict.
c. 95, s. 23.

Registrar
may issue
subpœnas.

The practice with regard to citations in non-contentious business is in all respects the same as that which prevailed before

Practice with
regard to

(*h*) On a motion for attachment of a person served with a subpoena under this section to bring in a testamentary paper and failing to comply with it, the party proceeded against must receive notice of the application in the first instance: *Baigent v. Baigent*, 1 P. D. 421. The Rules of the Supreme Court—*e.g.* R. S. C. Order XLI. r. 5—apply.

(*i*) If the person served with the subpoena has not the will in his possession, he should file an affidavit to that effect in the registry: *Rawlings v. Emmerson*, 57 L. J. P. & M. 1; he may then be ordered to attend to be examined as to his knowledge of the paper: *In the goods of Laws*, L. R. 2 P. & D. 458; *Banford v. Pickard*, 6 P. D. 33; *Parkinson v. Thornton*, 37 L. J. P. & M. 3; *In the estate of Floyd*, 53 S. J. 790, 801. Obedience to the subpoena may be enforced by a motion for attachment: *Simmons v. Deane*, 27 L. J. P. & M. 103. Where a subpoena has been personally served upon a person to bring in a testamentary paper, and such person fails to comply therewith, the Court will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in Court to be examined in reference to his possession of such paper: *Parkinson v. Thornton*, *supra*; *In the estate of Floyd*, *supra*. And where an executor who had intermeddled with the estate, but did not take probate of the Will, had been cited to do so and had not obeyed the citation, the Court refused to order an attachment in the first instance, but directed that a peremptory order should be served to take probate within ten days: *Mordaunt v. Clarke*, L. R. 1 P. & D. 592.

citations in non-contentious business.

the passing of the Judicature Acts. Not having been affected by them in any way it continues in force as before (j). For rules relating to the practice in this respect, see Probate Rules of 1862 (Non-Contentious), Rules 68—70.

Solicitor who prepared the Will has no lien on it.

It has been more than once laid down by Lord Eldon, that the lien of an attorney or solicitor does not extend to the original Will executed by his client; and that he cannot refuse the production of it (k).

Holder of a Will not allowed to dispute jurisdiction.

In *Brown v. Coates* (l), Sir John Nicholl strongly inclined to an opinion, that a mere holder of a Will, monished to bring it into the Prerogative Court, could not be allowed to dispute the jurisdiction, and put the other party to the necessity of showing jurisdiction by giving proof of *bona notabilia*, prior to giving up the Will.

Disputed Wills ought to be lodged in the registry.

Disputed Wills ought to be lodged in the Registry of the Court for custody. On one occasion Sir John Nicholl observed (m), "Practitioners have no right to keep Wills in their possession. I have, in several instances, stated, that the expense necessary to get a Will out of the hands of a party, must fall upon those who withhold it."

Order to bring in all testamentary papers.

It has been the constant practice of the Court, to order all testamentary papers to be brought in when required. And a duplicate is a part of a Will, and to be considered a testamentary paper within this rule (n).

Deposit of Will in registry: when and how it can be got out. 20 & 21 Vict. c. 77, s. 66. Place of deposit of original Wills.

Whether the Will respected personal estate only, or whether it was a mixed Will, concerning both lands and goods, it was, after probate, deposited, together with all other testamentary papers, in the Registry of the Ecclesiastical Court in which it had been proved. And now, by the 66th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), "there shall be one place of deposit under the control of the Court of Probate, at such place in London or Middlesex as her Majesty may by order in Council direct, in which all the original Wills brought into the Court or of which probate or administration with the

(j) *In the goods of Tomlinson*, 6 P. D. 209.

(k) *Georges v. Georges*, 18 Ves. 294; *Lord v. Wormleighton*, Jac. 580; *Balch v. Symes*, 1 Turn. & Russ. 87. He engages to make a Will effectual for the purposes of the testator; which it cannot be unless it is produced elsewhere: Jac. 581. See also *Ex parte Law*, 2 A. & E. 45; *In the estate of Harvey*, [1907] P. 239.

(l) 1 Add. 345.

(m) *Cunningham v. Seymour*, 2 Phillim. 250.

(n) *Killican v. Parker*, 1 Cas. temp. Lee, 662.

Will annexed is granted under this Act in the principal registry thereof, and copies of all Wills the originals whereof are to be preserved in the district registries, and such other documents as the Court may direct, shall be deposited and preserved, and may be inspected under the control of the Court and subject to the rules and orders under this Act" (*o*). If the Will should be needed in order to be put in evidence in some other judicial proceeding, the attendance of the registrar, or other proper officer, with it must be procured (*p*). In some cases, an order of the Court of Chancery has been obtained that it shall be delivered out by the registrar on giving security to return it (*q*). And the Ecclesiastical Court itself has, on several occasions, ordered the Will to be delivered out of its Registry for the legal purpose of its being sent to the proper place for its custody (*r*). The last of these orders (*s*) appears to have been a decree that the Will and codicils of Napoleon Bonaparte should be delivered out (after notarial copies had been made) in

(*o*) By sect. 67, "The judge shall cause to be made from time to time in the principal registry of the Court of Probate calendars of the grants of probate and administration in the principal registry, and in the several district registries of the Court, for such periods as the judge may think fit, each such calendar to contain a note of every probate or administration with the Will annexed granted within the period therein specified, and also a note of every other administration granted within the same period, such respective notes setting forth the dates of such grants, the registry in which the grants were made, the names of the testators and intestates, the place and time of death, the names and descriptions of the executors and administrators, and the value of the effects; and the calendars to be so made shall be printed as the same are from time to time completed."

By sect. 68, "The registrars shall cause a printed copy of every calendar to be transmitted through the post or otherwise, to each of the district registries, and to the office of Her Majesty's Prerogative in *Dublin*, the office of the Commissary of the county of *Midlothian* in *Edinburgh*, and such other offices, if any, as the Court of Probate shall from time to time by rule or order direct; and every printed copy of a calendar so transmitted as aforesaid shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected."

By sect. 69, "An official copy of the whole or any part of a Will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the Will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act."

(*p*) See Probate Rules, 1862 (Non-contentious), rr. 82, 83.

(*q*) See *post*, § IX.

(*r*) *Post*, § VII., p. 298, n. (*g*).

(*s*) *In re Napoleon Bonaparte*, 2 Robert. 606.

order to be sent to the legal authorities in France to be recorded there in the proper place.

Stat. 20 & 21
Vict. c. 77,
s. 64 :

probate to be
evidence of
the Will in
suits as to
real estate,
unless the
validity of
the Will is
disputed.

Stat. 20 & 21
Vict. c. 77,
s. 62.

But with respect to cases where it was formerly necessary to produce the original Will, in order to establish a devise of real estate, it is enacted by stat. 20 & 21 Vict. c. 77 (Court of Probate Act), s. 64, that on notice being given of intending to put the probate in evidence, the probate shall be sufficient evidence of the Will and its validity, unless the other party shall give notice that he intends to dispute the validity of the Will.

This subject, and the enactment contained in the 62nd section of the same statute, that the probate shall be conclusive of the validity of the Will, in all proceedings affecting the real estate, where the probate has been granted after proof in solemn form, &c., and also the effect of the Land Transfer Act, 1897, with regard to probate and letters of administration in respect of real estate, will be considered hereafter (*t*), together with the general doctrine of the effect of probate.

SECTION II.

When the Will is to be proved.

A Will cannot be proved in the lifetime of the testator.

20 & 21 Vict.
c. 77, s. 91.
As to depositories for safe custody of the Wills of living persons.

Time within which the Will ought to be proved.

Penalty under 55 Geo. III. c. 184, s. 37,

If the testator be yet living, the judge may not proceed to the proving of his testament: because it is of no force as long as the testator lives, who also may revoke or alter the same at any time before his death (*u*).

By 91st section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is enacted, that "One or more safe and convenient depository or depositories shall be provided, under the control and directions of the Court of Probate, for all such Wills of living persons as shall be deposited therein for safe custody: and all persons may deposit their Wills in such depository upon payment of such fees and under such regulations as the judge shall from time to time by any order direct."

The time, after the testator's death, when the Will is to be proved is somewhat uncertain, and left to the discretion of the judge, according to the distance of the place, the weight of the Will, the quality of the executors, the absence of the witnesses, the importunity of creditors and legatees, and other circumstances incident thereto. And by stat. 55 Geo. III. c. 184,

(*t*) *Post*, Pt. I. Bk. VI. Ch. I.

(*u*) *Swinb.* Pt. 6, s. 13, pl. 1.

s. 37, it is enacted, that "if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the Will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the Will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the stamp-duty payable on the probate of the Will, or letters of administration of the estates and effects of the deceased."

for administering without obtaining probate or letters of administration.

The penalty now substituted for that imposed by the above section is one hundred pounds or double the amount of duty chargeable, according as the Commissioners elect, which is a debt due to the Crown, and is recoverable by any of the ways or means in force for the recovery of probate, legacy or succession duty (*w*).

Penalty now in force in substitution for above.

By rule 43 of the "General Rules and Orders for the Registrars of the Principal Registry (made in 1862)," "No probate or letters of administration with the Will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars."

Rule 43, P. R. 1862.

And by rule 45, "in every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory the registrars are to require such proof of the alleged cause of delay as they may see fit."

Rule 45.

If a death cannot be proved, recourse must be had to the presumption of law (*x*). At common law a jury may presume

Presumption of death.

(*v*) Customs and Inland Revenue Act, 1881, 44 Vict. c. 12, s. 40; Finance Act, 1894, s. 8 (1), (5) and (6). Proceedings may also be taken under stat. 28 & 29 Vict. c. 104, s. 57. See also *Att.-Gen. v. New York Breweries Co.*, [1898] 1 Q. B. 205; [1899] A. C. 62.

(*w*) Swinb. Pt. 6, s. 13, pl. 2; Godolph. Pt. 1, c. 20, s. 3; *Dean v. Davidson*, 3 Hagg. 554; *In the goods of Hutton*, 1 Curt. 595.

(*x*) *Doc v. Jesson*, 6 East, 84, 85; *Doc v. Nepean*, 5 B. & Ad. 86; *S. C.* in error, 2 M. & W. 894.

that a man is dead at the expiration of seven years from the time he was last known to be living (*y*). There is, however, no legal presumption as to the date of the death, nor of death without issue (*z*). So, in the Probate Division, if it be uncertain whether the testator or supposed intestate be dead or alive, the evidence must be laid before the Court, and the Court, if satisfied that the facts proved raise a reasonable presumption that the testator or intestate is dead, will grant the applicant leave to depose on oath that he died on or since the last date on which he is known to have been alive (*a*). The Court, though giving due weight to the presumption, requires proper inquiries to be made in addition (*b*), and, moreover, on proof of sufficient inquiries, may allow the death of a testator or intestate to be sworn less than seven years after his disappearance (*c*).

Leave will not, as a rule, be given to presume the death of a person other than the person whose estate is to be administered; therefore, where a married woman died intestate, and her next of kin applied for administration, the Court refused to presume the death of her husband, who had not been heard of for over sixteen years (*d*). In such cases in the absence of definite proof of the date of death of the husband, and of his having predeceased his wife, the Court will not as a general

(*y*) *Doe v. Nepean*, *ubi supra*; *In the goods of Smith*, 2 Sw. & Tr. 508; *Thomas v. Thomas*, 2 Dr. & Sm. 298; *Re Phene's Trusts*, L. R. 5 Ch. App. 139; *Re Aldersey*, [1905] 2 Ch. 181; *In the goods of Alston*, [1892] P. 142.

(*z*) *Re Jackson*, [1907] 2 Ch. 354.

(*a*) See *In the goods of Norris*, 1 Sw. & Tr. 6; *In the goods of Main*, *ibid.* 11; *In the goods of How*, *ibid.* 53; *In the goods of Bishop*, *ibid.* 303; *In the goods of Smyth*, 28 L. J. P. & M. 1; *In the goods of Barber*, 11 P. D. 78; *In the goods of Spenceley*, [1892] P. 225; *In the goods of Saul*, [1896] P. 151; *In the goods of Robertson*, [1896] P. 8; *In the goods of Clarke*, [1896] P. 287; *In the goods of Dodd*, 77 L. T. 137; *In the goods of Matthews*, [1898] P. 17; *In the goods of Winstone*, [1898] P. 143; *In the goods of Hurlston*, [1898] P. 27; *In the estate of Jackson*, 87 L. T. 747; *In the estate of Walker*, [1909] P. 115. No application to the Court is necessary when the fact of the death is known, but the precise date is uncertain: *In the estate of Long-Sutton*, [1912] P. 97. And during the progress of the recent war it was laid down that when it is certified by the War Office that a soldier, previously reported missing, may be considered to be dead, a grant may be made without an order on motion, upon an oath in which it is sworn that such person died on or since the day on which he was reported missing: [1916] W. N. 224.

(*b*) *In the goods of Robertson*, [1896] P. 8.

(*c*) *In the goods of Matthews*, [1898] P. 17; *In the goods of Winstone*, [1898] P. 143.

(*d*) *In the goods of Clark*, L. R. 15 P. D. 10.

rule grant administration to the wife's next of kin without citing the husband or his representatives (e).

SECTION III.

Of the Practice of the Probate Division, and herewith of the Proof of Wills in Common Form.

By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 13, "There shall be established for each of the districts specified in Schedule (A.) to this Act, and at the places respectively mentioned in such schedule, a public registry attached to and under the control of the Court of Probate, hereinafter referred to as 'The District Registry.'"

20 & 21 Vict.
c. 77, s. 13.
District
Registries to
be established.

By the 46th section of the same statute, "Probate of a Will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate, and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, and such place of abode being stated in the affidavit, and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of *England* accordingly" (f).

S. 46.

Probates and administration may be granted in common form by District Registrars, if it shall appear by affidavit that the testator, &c. had a fixed place of abode.

And by sect. 47, "Such affidavit shall be conclusive for the purpose of authorizing the grant by the district registrar of probate or administration; and no such grant of probate or

S. 47.

Affidavit to be conclusive for authorizing grant of probate.

(e) *In the goods of Nicholls*, L. R. 2 P. & D. 461. The Court has in some instances dispensed with citation, under sect. 73 of the Court of Probate Act, 1857, on the applicant swearing that he believed that the deceased died a widow, or that he believed himself to be next of kin, or as the case might be: see *In the goods of Reed*, 29 L. T. 932; *In the estate of Callicot*, [1899] P. 189; *In the estate of Byrne*, 84 L. T. 570; *In the estate of Chapman*, [1903] P. 192; *In the estate of Love*, 17 T. L. R. 721; *In the estate of Bowden*, 21 T. L. R. 13. But see *In the estate of Jackson*, 87 L. T. 932; *In the goods of Pridham*, 61 L. T. 302; *In the estate of Harper*, [1899] P. 59. In *In the estate of Walker*, [1909] P. 115, a creditor was permitted to swear his belief in the death of an intestate who was missed on a cross-channel steamer when the vessel was at sea.

(f) It is not obligatory to apply for probate or administration to any district registry, but the application may, in every case, be made to the principal registry. See sect. 59 of the Court of Probate Act, 1857. As to second and subsequent grants, see the Court of Probate Act, 1858, s. 20, *ante*, p. 210.

administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death, and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required."

S. 48.
District Registrar not to make grants when there is a contention.

By sect. 48, "The district registrar shall not grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form."

S. 49.
As to transmission of notice of application for grants of probate, &c., to District Registrar.

By sect. 49, notice of every application to any district registrar for the grant of probate or administration shall be transmitted by such district registrar to the registrars of the principal registry by the next post after such application shall have been made; and such notice shall contain such particulars as in the section mentioned; and no probate or administration shall be granted in pursuance of such application until such district registrar shall have received a certificate under the hand (*g*) of one of the registrars of the principal registry, that no other application appears to have been made in respect of the goods of the same deceased person.

S. 51.
District registrars to transmit lists of probates and administrations and copies of Wills.

By sect. 51, every district registrar is to transmit to the registrars of the principal registry a list of probates and administrations and a certified copy (*h*) of every Will to which any such probate or administration relates.

S. 52.
District Registrars to preserve original Wills.

By sect. 52, "Every district registrar shall file and preserve all original Wills of which probate or letters of administration, with the Will annexed, may be granted by him, in the public registry of the district subject to such regulations as the judge of the Court of Probate may from time to time make in relation to the due preservation thereof and the convenient inspection of the same."

(*g*) By stat. 21 & 22 Vict. c. 95, s. 26, the certificate need not be under the hand, but may be issued under a stamp provided for that purpose, and approved of by the judge of the Court, and see rules 55 and 56 of the Rules of 1863 for District Registries.

(*h*) By stat. 21 & 22 Vict. c. 95, s. 25, these copies may be certified and transmitted under a stamp provided for that purpose.

By sect. 29, "The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court" (i).

Stat. 20 & 21
Vict. c. 77,
s. 29.

Practice of
the Court of
Probate to be
according to
the practice
of the Pre-
rogative
Court.

By sect. 30, rules and orders were to be made for regulating the procedure of the Court.

By sect. 18 of the Judicature Act, 1875, it is enacted that "All rules and orders of Court in force at the time of the commencement of this Act in the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Admiralty Court, or in relation to appeals from the Chief Judge in Bankruptcy, or from the Court of Appeal in Chancery in bankruptcy matters, *except so far as they are expressly varied by the first schedule hereto, or by rules of Court made by order in council before the commencement of this Act* (j), shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act.

38 & 39 Vict.
c. 77, s. 18.

Rules of
Probate,
Divorce and
Admiralty
Courts to re-
main in force.

"The President for the time being of the Probate and Divorce Division of the High Court of Justice shall have, with regard to non-contentious or common form business in the Probate Court, the powers now conferred on the judge of the Probate Court by 20 & 21 Vict. c. 77, sect. 30."

Jurisdiction
of President
of Probate,
&c. Division
to make rules
as to non-
contentious
probate
business.

Under the powers conferred by 20 & 21 Vict. c. 77, s. 30, copious rules and orders were, in the years 1862 and 1863, made for the guidance of practitioners in the Court of Probate, both in respect of contentious and non-contentious business, and for the instruction as well of the principal registrars as of the district registrars, together with a very large collection of forms; as to which it is thought more expedient to refer to the books of Probate practice than to insert them in this Treatise. These rules, orders, and directions are for the most part founded on the doctrines and practice previously established in the Pre-

(i) Sir C. Cresswell appears to have been of opinion that this section applies to the procedure only of the Court, and not to the principles on which it is to act: *In the goods of Oliphant*, 1 Sw. & Tr. 525. See also *Belbin v. Skeats*, 1 Sw. & Tr. 148; 27 L. J. P. & M. 56; *Braine v. Braine*, 1 Sw. & Tr. 271; 29 L. J. P. & M. 151; *Druce v. Young*, [1899] P. at p. 101.

(j) The words in italics are repealed by the Stat. Law Rev. Act, 1883.

rogative Court with regard to the making, &c. of Wills, which have already been stated in the progress of this work.

These rules, as altered and amended from time to time, still govern the practice of the Court in non-contentious business, and are entirely unaffected by the Rules of the Supreme Court framed under the Judicature Acts (*k*). The rules of the Probate Court continue to regulate the practice of the Court in contentious business also, except in so far as they have been altered or annulled by the Rules of the Supreme Court (*l*). And it has been held that where there are distinct rules in the Probate Court dealing with a particular subject-matter, they remain in force notwithstanding that there may be a different rule dealing with the same subject-matter in the Rules of the Supreme Court (*m*).

Ways of
proving a
Will:

i. Common
Form:

ii. Solemn
Form.

Common
form.

A testament may be proved in two ways; either in Common Form, or by Form of Law; which latter mode is also called the Solemn Form, and, sometimes, proving *per testes* (*n*).

A Will is proved in common form, when the executor presents it before the judge, and in the absence, and without citing the parties interested, produces witnesses to prove the same: who testifying, by their oaths, that the testament

(*k*) The Judicature Acts do not appear to have altered the *procedure or practice* of the Court of Probate with respect to non-contentious business. Nor do they alter or enlarge the *jurisdiction* of the Court of Probate in non-contentious matters: *In the goods of Tomlinson*, 6 P. D. 209; and see *In the goods of Bristow*, 66 L. T. 60; *In the goods of Caspari*, 75 L. T. 663. But prior to the passing of the Judicature Acts the Probate Court never recognized the doctrine of equitable conversion, and in the case of *In the goods of Gunn*, 9 P. D. 242, 244, Sir James Hannen said: "It appears to me that a very great change has been worked now by the fusion of all the Courts into one. There is no difference between the law to be administered in this [Probate] Division and elsewhere, but each Court is to ascertain what the law is, whether legal or equitable, and I think therefore it is open to me to establish a different basis to that which existed in the Probate Court. I am of opinion that where freehold property has had impressed upon it a changed character by reason of the doctrine of equitable conversion, it is to be treated as personalty, and probate duty is payable, and it therefore follows that probate must be granted." And in the case of *Att.-Gen. v. Marquis of Ailesbury*, 12 App. Cas., at p. 696, Lord Macnaghten, in the course of his judgment, cited this case with approbation. The original Rules of 1862 for non-contentious business have been added to and altered from time to time, and by rule 109 (dated 20th November, 1897) are made applicable to grants under the authority of the Land Transfer Act, 1897.

(*l*) See *Kennaway v. Kennaway*, 1 P. D. 148; *White v. Duvernay*, [1891] P. 290; *Hopkinson v. Carter*, [1909] P. 118.

(*m*) *Hopkinson v. Carter*, *supra*.

(*n*) Swinb. Pt. 16, s. 14, pl. 1; Godolph. Pt. I, c. 20, s. 4.

exhibited is the true, whole, and last Will and testament of the deceased, the judge thereupon, and sometimes upon less proof, does annex his probate and seal thereto (o).

If the Will be perfect on the face of it, and there is an attestation clause, referring to the solemnities required by the statute 1 Vict. c. 26, s. 9, as having been complied with, probate in common form may be obtained upon the oath of the executor alone. But if there is no attestation clause, or if there is a clause which does not state a performance of all the statutory requirements, an affidavit is required from at least one of the subscribing witnesses, by which it must appear that the Will was executed in compliance with the statute (p). But this rule may be dispensed with, if the witnesses are dead, or if for other reasons no affidavit can be obtained from either of them (q).

Manner of obtaining probate in common form.

Where no or imperfect attestation clause.

Where it appears from the affidavits, the attestation clause being imperfect, that the Will was not properly attested by the witnesses under the statute, the Court will not decree administration to pass to the effects of the deceased *as dead intestate*; for there might be collusion: All that the Court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration if they think proper; as notwithstanding the Court declines to grant Probate, the Will might be propounded and established (r).

If a Will, bearing date on or after January 1, 1838, has upon the face of it any unattested obliteration, interlineation, or alteration, the practice is to require an affidavit, showing whether they were made before or after the execution of the Will (s).

Probate of Wills exhibiting alterations and obliterations.

(o) Swinb. Pt. 6, s. 14, pl. 2; Godolph. Pt. 1, c. 20, s. 4. The Will is brought into the principal or district registry; and probate is then granted on the oath of the executor and any further affidavits which may be required.

(p) *In the goods of Johnson*, 2 Curt. 341; *In the goods of Batten*, 7 Notes of Cas. 290; Rule 4, P. R. 1862 and 1871 (Non-Contentious Business). As to what is sufficient attestation, see *ante*, p. 61 *et seq.*

(q) *In the goods of Luffman*, 5 Notes of Cas. 183; *In the goods of Dickson*, 6 Notes of Cas. 278; Rule 7, P. R. 1862 (Non-Contentious).

(r) *In the goods of Ayling*, 1 Curt. 913. See also *In the goods of Watts*, *ib.* 594; Rule 5, P. R. 1862 (Non-Contentious). If on perusing the affidavit or affidavits setting forth the facts of the case it appear doubtful whether the Will or codicil has been duly executed, the registrar may require the parties to bring the matter before the judge on motion: Rule 6.

(s) Rules 8, 9, 10, and 11, P. R. (Non-Contentious Business). One of the subscribed witnesses will suffice, if he can speak positively.

Probate in
fac simile.

Where alterations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the Will *fair*, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the Will may be affected by the appearance of the original paper, the Court will order the probate to pass in *fac simile* (*t*). And it appears to have been sometimes supposed that the grant of such a probate leaves it open to a Court of Construction to inquire whether such alterations of the Will were made under such circumstances as to be effectual (*u*). But it is plain, it would seem, that unless the Court of Probate had adjudged that the obliterations or other alterations had been effectually made, the decree would have been for probate of the Will in its original state. A *fac simile* probate, therefore, of a Will made after the Wills Act came into operation is conclusive in the Courts, that the Will was in that state before its execution, *i.e.*, that the testator duly executed it with the alterations or cancellations upon it (*w*). And the object of the *fac simile* is that the alteration, &c. may possibly help to show the meaning of the testator: As. for example, in a case where a testator says, "I give A. B. an annuity of 500*l.*, and I also give him 1,000*l.*": and the testator then strikes out down to and including the words "500*l.*" (*x*).

Probate after
citation of
persons

In a case where a testator, having duly executed a Will, made a later one, betraying on the face of it insanity, the

But if none of them can do so, they should all, whatever be their number, join in the affidavit: *In the goods of Townshend*, 5 Notes of Cas. 146. If none of them can depose negatively or affirmatively, the practice is for the executor to join in the affidavit and depose that he cannot adduce any further or other evidence, and then probate will be granted of the Will as it originally stood. When two witnesses join in one affidavit, both must depose to the due execution: *In the goods of Batten*, 7 Notes of Cas. 290; and see Rule 57, P. R. (Non-Contentious Business). See *ante*, p. 105. as to probate where words are completely obliterated.

(*t*) See *post*, Pt. I. Bk. VI. Ch. I; *In the goods of Raine*, 34 L. J. P. M. & A. 125; *In the goods of Smith*, 3 Sw. & Tr. 889.

(*u*) See the argument of Sir R. Bethell in *Shea v. Boschetti*, 18 Beav. 321; 3 De G. M. & G. 778, 779.

(*w*) *Gann v. Gregory*, 3 De G. M. & G. 777; *post*, Pt. I. Bk. VI. Ch. I.

(*x*) *Gann v. Gregory*, 3 De G. M. & G. 780. Suppose, again, the words "to be equally divided amongst them" interlined (without any *caret* to show where they were intended to come in), and in such a position that they are applicable to two sets of legatees: In such a case, it should seem, there must, of necessity, be a *fac simile* probate.

executors of the earlier Will took out a decree calling on all persons interested in the later paper to propound it, with an intimation that, on not appearing, the Court would decree probate of the earlier Will: The persons cited, executed proxies declining to propound the later paper, and consenting to probate of the earlier one: And Sir H. Jenner Fust accordingly decreed probate of it in common form, without the later paper having been propounded at all, and said that the course which had been taken was that which ought to be adopted in all similar instances (y).

interested to
propound
a later paper.

SECTION IV.

Proof of Wills in Solemn Form, or per Testes.

This is a part of the “contentious business” of the Court, which now commences by the issue of a writ of summons in an action which is substituted for the citation formerly used (z).

Proof in
solemn form;
contentious
business.

When a Will is to be proved in solemn form, it is still requisite, in accordance with the old practice, that such persons as have interest (that is to say, persons interested under other Wills or codicils, and the widow and next of kin of the deceased, to whom the administration of his goods ought to be committed, if he died intestate, and now the heir-at-law, if there is real estate) should be made parties to the action, or should be cited to be present at the probation and approbation of the testament.

Action now
substituted
for former
citation.
Proof in
solemn form
under the old
practice:

According to the practice under the Court of Probate Act, 1857, declarations and pleas were substituted for the old modes of pleading. Now, by the Judicature Acts, statements of claim and defences are substituted for declarations and pleas.

under the
new practice.

By rule 4 of the Rules and Orders, 1862 (Contentious), “Executors or other parties who, previously to the passing of the ‘Court of Probate Act, 1857,’ might prove Wills in solemn form of law, shall be at liberty to prove Wills under similar

(y) *Palmer v. Dent*, 2 Robert. 284; and see *Morton v. Thorpe*, 3 Sw. & Tr. 179; *Quick v. Quick*, [1899] P. 187; *In the estate of Dennis*, [1899] P. 191; *In the estate of Bootle*, 84 L. T. 570.

(z) R. S. C. 1883, Ord. II. r. 1. On the question how far the practice in contentious business is now governed by the Judicature Acts and Rules of the Supreme Court framed thereunder, see *Kennaway v. Kennaway*, 1 P. D. 148; which case shows that notwithstanding the substitution of a writ of summons for the initial citation the former practice as to citing to see proceedings still obtains; and *vide ante*, p. 232.

circumstances, and with the same privileges, liabilities, and effect, as heretofore."

Rule 5.—"Next of kin and others, who, previously to the passing of the said Act, had a right to put executors or parties entitled to administration with Will annexed upon proof of a Will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore."

Rule 6.—"Parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore" (a).

The executor may, after proof in common form, be cited to prove the Will *per testes*:

The difference between the common form and the solemn form, with respect to citing the parties interested, works this diversity of effect: viz., that the executor of the Will proved in common form may, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes* in solemn form (b). Thus, a probate of a codicil granted in common form 1808, was upon the citation of the executor by a next of kin to prove it *per testes* in due form of law, revoked in 1818 (c), and one granted in 1807, by a similar proceeding revoked in 1820 (d). So that if the witnesses be dead in the meantime, it may endanger the whole testament. Whereas, the testament being proved in solemn form of law, the executor

but not when already proved in solemn form.

(a) See, as to interveners, R. S. C. Ord. XII. r. 23. These rules govern the present practice as to parties: see Ord. XVI. r. 10.

(b) Godolph. Pt. 1, c. 20, s. 4. Indeed, Swinburne, Pt. 6, s. 14, pl. 4, seems to consider ten years as the limit within which the executor may be compelled to prove: but this probably is a typographical mistake for thirty. See 4 Burn. E. L. 318, Phillimore's edit. However, in *Hoffman v. Norris* (Prerog. 1805), reported in a note to *Newell v. Weeks*, 2 Phillim. 231, Sir Wm. Wynne says, "I do not know that there is any specific time that limits a party." See also *Merryweather v. Turner*, 3 Curt. 802, 817; *In the goods of Topping*, 2 Robert. 620, by Sir J. Dodson, accord. But where a party who is thus entitled to call in the probate and put the executor to proof of the Will, chooses to let a long time elapse before he takes this step, he is not entitled to any indulgence at the hands of the Court. He is entitled to have the law strictly administered and to nothing beyond it: *Blake v. Knight*, 3 Curt. 553. And under such circumstances the Court (having regard to the infirmity of the witnesses' memory after the lapse of time) is, it would seem, somewhat astute to discover circumstances whereupon to found an inference that the formalities required for a due execution of the Will have been gone through. See the cases collected, *ante*, p. 76.

(c) *Satterthwaite v. Satterthwaite*, 3 Phillim. 1.

(d) *Finucane v. Gayfere*, 3 Phillim. 405.

is not to be compelled to prove the same any more: and although all the witnesses afterwards be dead, the testament still retains its full force (e).

Hence, not only are Wills proved in solemn form, at the instance of persons who desire to invalidate them; but the executor himself may, and in prudence often does, for greater security, propound and prove the Will in the first instance, *per testes*, making the next of kin, and in cases coming within the operation of the Land Transfer Act, 1897, also the heir-at-law, defendants in the action, or else citing these persons together with "all others pretending interest in general," to "see proceedings;" which being done, the Will shall not be set aside afterwards (provided there be no irregularity in the process) when the witnesses are dead (f).

The executor himself may prove the Will in solemn form in the first instance.

Executors cannot be allowed to issue a citation against the legatees under a codicil, which they do not believe to be a true codicil of the deceased, calling on them to propound and prove it if they think fit. The proper course is for the executors to prove the Will in solemn form, and cite the next of kin and the asserted legatees under the codicil to see the Will proved (g).

(e) Swinb. Pt. 6, s. 14, pl. 4. Probate granted in solemn form may be revoked where the judgment of the Court has been obtained by fraud: *Birch v. Birch*, [1902] P. 130; *Priestman v. Thomas*, 9 P. D. 70; or where a later Will is afterwards discovered. The decree in an action for probate in solemn form binds all parties to the action, and persons claiming through them; and also—unless the suit ends in a compromise—all persons who, though not parties to the action, were cognizant of the proceedings and had the right to intervene in them. See *Wytcherley v. Andrews*, L. R. 2 P. & D. 327; *Newell v. Weeks*, 2 Phillim. 224; *Ratcliffe v. Barnes*, 2 Sw. & Tr. 486; *Young v. Holloway*, [1895] P. 87; *Peters v. Tilly*, 11 P. D. 145; *Ritchie v. Malcolm*, [1902] Ir. R. 403; *Mecredy v. Brown*, [1906] 2 Ir. R. 437. And *vide post*, p. 239.

(f) 1 Ought. tit. 6, s. 5; tit. 222, s. 1, 2; *Lister v. Smith*, 3 Sw. & Tr. 53. And the executor is entitled to deduct his costs of proving the Will in solemn form out of the estate: *Burls v. Burls*, L. R. 1 P. & D. 472, 476. Where an executor has proved the Will in common form, a party desirous of putting him to proof in solemn form commences an action for revocation, having first cited the executor to bring in the probate. If the executor desires to sustain the Will, he must either plead and propound it in the action for revocation, or he must issue a writ himself to obtain proof in solemn form. See Mortimer on Probate, pp. 582—587.

(g) *In the goods of Benbow*, 2 Sw. & Tr. 488. *Sed quære*. Executors of a Will are allowed to cite the beneficiaries under a later Will to propound it (see *Palmer v. Dent*, 2 Robert. 284); and there seems to be no reason for distinguishing between a codicil and any other testamentary document. It is believed that citations in the form under consideration have frequently been issued without question. In *Speke v. Deakin*, 109 L. T. 719, the executors proved a Will and two codicils in common form. A legatee successfully propounded and

The executor may be compelled to prove in solemn form by a next of kin, who has acquiesced and received a legacy:

The next of kin, as such merely, are entitled to call for proof in solemn form of the deceased's Will, of common right. And the mere acquiescence of a next of kin to the probate being taken in the common form is no bar to the exercise of this right, even though he has received a legacy as due to him under the Will; for he is still at liberty to call in the probate, and put the executor on proof of that identical Will *per testes* (h). A strong instance of this occurs in the case of *Core v. Spenser* (which was decided in the Prerogative Court of Canterbury, in 1796) (i), where Spenser, the executor, was cited to bring in the probate of a Will, taken in 1788, eight years before, at the suit of Core, whose mother had received an annuity under that Will for five of the eight years; and she, Core herself, her mother dying at the end of the fifth year, for the remaining three: Spenser, in that case, appeared under protest, and contended that Core was barred from putting him on proof of the Will: But the Court thought otherwise, and overruled the protest. However, long acquiescence, unaccounted for by any special circumstances, and acts done by a next of kin under the provisions of the Will, may (if no fact appears which excites a reasonable suspicion of the genuineness or validity of the Will) amount to such a waiver of his rights, as to preclude him from putting the Will in suit (k). But where a Will of the deceased having been found in which the plaintiff was named executor, he gave notice thereof to the defendant, who was about to obtain a grant in the goods of the deceased as interested under a previous Will, and entered a caveat, and before the caveat had been warned and therefore before contentious proceedings had originated therefrom, he withdrew it, and signified to the defendant that he did not seek to establish his Will, and administration with the earlier Will annexed issued to the defendant, and subsequently the plaintiff took out a citation calling upon the defendant to bring in the administration and show cause why it should not be revoked, the Court held that the plaintiff was not

proved a third codicil, and the executors were condemned in the costs of the suit.

(h) *Bell v. Armstrong*, 1 Add. 370; *Merryweather v. Turner*, 3 Curt. 802.

(i) 1 Add. 374, in Sir J. Nicholl's judgment in the case of *Bell v. Armstrong*.

(k) *Hoffman v. Norris*, 2 Phillim. 230, in a note to *Newell v. Weeks*; *Braham v. Burchell*, 3 Add. 257, 258. See also *Merryweather v. Turner*, 3 Curt. 802; and cf. *Mohan v. Broughton*, [1899] P. 211; [1900] P. 56 (C. A.). See *ante*, p. 236, n. (b).

precluded from continuing a suit to determine which was the last Will of the deceased (*l*).

But before a legatee, who has received all or part of his legacy, can be permitted thus to dispute the Will, he must bring into Court the amount of the legacy paid to him, to abide the event of the suit (*m*). but he must bring his legacy into Court:

A legatee who has renounced administration *cum testamento annexo*, as legatee and next of kin, whereupon it has been granted to another, is not barred by such renunciation from contesting the Will; and he may therefore cite such administrator to bring the letters of administration into Court to prove the Will by witnesses, or to show cause why the deceased should not be pronounced to have died intestate, and why administration should not be granted to himself (*n*). Legatee who has renounced administration with the Will annexed:

But when the executor propounds and proves the Will, *per testes*, of himself, duly citing the next of kin "to see proceedings," all next of kin so cited are, generally speaking, thereby for ever barred; and if he so propounds and proves the Will against *certain* only of the deceased's next of kin, without having cited them all to see proceedings, the others, even though uncited, if to a certain extent privy to and aware of the suit, shall not put the executor on proof *per testes* of the Will, so once already proved, a second time (*o*). if the executor himself propounds the Will, a next of kin, though not cited, cannot call for proof, if privy to the first suit.

It is clearly established that before a person can be permitted

(*l*) *Goddard v. Smith*, L. R. 3 P. & D. 7; and see *Williams v. Evans*, [1911] P. 175, where the next of kin, who was named executor of the Will which he desired to contest, had taken probate in common form, acted as executor and intermeddled with the estate.

(*m*) *Bell v. Armstrong*, 1 Add. 374; *Braham v. Burchell*, 3 Add. 256, 257. *Secus*, where the legatee is a minor: *Goddard v. Norton*, 5 Notes of Cas. 76. The principle here laid down has several times been recognised by the Court in recent years, but the cases are not reported.

(*n*) *Gascoyne v. Chandler*, 2 Cas. temp. Lee, 241.

(*o*) *Newell v. Weeks*, 2 Phillim. 224; *Bell v. Armstrong*, 1 Add. 372. Accordingly it was held by Sir C. Cresswell that a next of kin, though not cited to see proceedings, and not having intervened, if in fact cognisant of a suit between the executor and another next of kin, ending in the establishment of the Will, is not at liberty in any way to oppose probate of such Will being taken: and where on a verdict, the Court had pronounced for a Will, and a next of kin so situated had entered a caveat, the Court directed probate to issue, in spite of the caveat, and condemned the next of kin in costs: *Ratchiffe v. Bornes*, 2 Sw. & Tr. 486; and see the cases collected *ante*, p. 237, n. (*e*). But this rule does not apply to a case where the parties to the suit compromise it and the decree is founded on the compromise: *Wytcherley v. Andrews*, L. R. 2 P. & D. 327.

to contest a Will, the party propounding has a right to call on him to show that he has some interest (*p*).

What interest a party must have to entitle him to oppose a Will.

Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper. Thus where a testator disposed of all his personal estate by his Will and gave his real estate, but none of his personal, to his brother's children, and by a codicil he gave them pecuniary legacies, revoking the devise to them of the real estate which was of greater value than the legacies; it was held that they might oppose the codicil alone, notwithstanding their only right to a share of the personalty was under it (*q*). Though a next of kin may, as such, oppose all the testamentary papers as having an interest in having them set aside as a whole, he has not a right to oppose any particular one he may think fit; for some interest in having that particular paper set aside, however remote, is necessary (*r*).

A creditor cannot dispute the validity of a Will, unless he has had a grant of administration:

A creditor has only a right to have a *constat* of the estate of the deceased, to see whether there are assets sufficient to pay the debts; but he cannot controvert the validity of a Will; for it is indifferent whether he shall receive his debt from an executor or an administrator; and if a creditor was admitted to dispute the validity of a Will, it would create infinite trouble, expense, and delay to executors (*s*).

but when administration is granted to him he may oppose a Will: and this without costs.

But when administration has been granted to a creditor, he may oppose a Will; he is the same for this purpose as the next of kin (*t*). And he has the same privileges as regards costs; because he is the appointee of the Court and defends in that character, and does not appear simply as a creditor (*u*).

Court not obliged *ex officio* to order citation to next of kin.

If nobody, who has the right, appears to oppose the Will, the Court is not obliged, *ex officio*, to order a citation to issue to call the next of kin (*w*).

(*p*) *Hingston v. Tucker*, 2 Sw. & Tr. 596. But when two persons oppose a Will, one cannot call upon the other to propound his interest: *Ibid*.

(*q*) *Kipping v. Ash*, 1 Robert. 270. See also *Dixon v. Allinson*, 3 Sw. & Tr. 572; *Lindsay v. Lindsay*, 42 L. J. P. & M. 32. But see the observations of Sir C. Cresswell on the first-named case in *Crispin v. Doglioni*, 2 Sw. & Tr. 17.

(*r*) *Baskcomb v. Harrison*, 2 Robert. 118; S. C., 7 Notes of Cas. 275.

(*s*) *Burroughs v. Griffiths*, 1 Cas. temp. Lee, 544; *Menzies v. Pulbrook*, 2 Curt. 845.

(*t*) *Dabbs v. Chisman*, 1 Phillim. 159, 160, *per curiam*.

(*u*) *Menzies v. Pulbrook*, 2 Curt. 851. *Vide post*, p. 242.

(*w*) *Burroughs v. Griffiths*, 1 Cas. temp. Lee, 544.

A legatee cannot set up a Will, after it has been litigated between the executor and next of kin, or between the executor and the executor of another Will, and pronounced against, unless he can show the parties agreed to set aside the Will by fraud or collusion (*x*). But if he is afraid the executor will not do justice, he may intervene for his interest pending the suit (*y*), but apparently not after the hearing (*z*).

A legatee cannot set up a Will which has been pronounced against after being litigated by next of kin, or by the executor of another Will.

A legatee who has been convicted of the murder or manslaughter of the testator, by reason of such conviction, cannot claim any interest under his will, and accordingly is not entitled to be a party to a suit in which the validity of the will is contested (*a*).

According to the old practice of the Prerogative Court, when an executor had been called upon by a next of kin to prove the Will *per testes*, and had sufficiently proved it, if the party who caused him to do this merely cross-examined the witnesses produced in support of the Will, he was not subject to costs, generally speaking (*b*). A next of kin might, however, exercise his undoubted right in this matter so vexatiously, as to make himself responsible, if not wholly, in part for the costs of his opponent (*c*). And there was a difference between next of kin, who are favourites of the Court, and the legatees under a former Will; for, though such a legatee might call for proof, *per testes*, of a Will, by which his interests under a former Will were prejudiced, and might interrogate the witnesses produced in support of that Will, he did this at the risk of being con-

According to old practice next of kin was not liable to costs, when he compelled the executor to prove *per testes* :

secus, of a legatee under prior Will :

(*x*) *Bittleston v. Clark*, 2 Cas. temp. Lee, 250; *Hayle v. Hasted*, 1 Curt. 236: or unless, as it is said, there has been neglect or mismanagement in the conduct of the suit: 1 Curt. 240.

(*y*) *Bittleston v. Clark*, 2 Cas. temp. Lee, 250.

(*z*) *Peters v. Tilley*, 11 P. D. 145. See the judgment of Butt, J., in this case, p. 149.

(*a*) *In the estate of Hall*, [1914] P. 1; and see *In the estate of Crippen*, [1911] P. 108.

(*b*) 1 Oughton, tit. 6, s. 7; *Reeves v. Freeling*, 2 Phillim. 56; *Urquhart v. Fricker*, 3 Add. 56.

(*c*) *Urquhart v. Fricker*, 3 Add. 57. As where a next of kin acquiesced in the probate, and received his legacy, and then, after a considerable interval, cited the executor to prove the Will: *Bell v. Armstrong*, 1 Add. 375. And where a next of kin and residuary legatee under a prior Will, suing *in formā pauperis*, put the executor of a later Will to proof *per testes*, after seven years' acquiescence in the probate, and the proofs then adduced were perfectly clear and satisfactory; the Court condemned the party in costs, suspending the taxation while he continued a pauper: *Wagner v. Mears*, 2 Hagg. 524.

demned in costs, if the Court had reason to suspect him of undue litigation (*d*).

And so it was as to an executor who had obtained probate of a former Will, or creditor who had a grant of administration.

The practice as to costs is now governed by R. S. C. 1883, Order XXI. r. 18, as amended August, 1898.

Where an executor, who had obtained probate of a former Will, or a creditor who had a grant of administration, opposed a later Will, he had the same right to do so without being subject to costs, as where a Will was opposed by next of kin (*e*). But costs might be decreed against a party who had taken probate of a Will which he knew was not the last Will of the deceased (*f*).

Rule 18 of Order XXI. of the Rules of the Supreme Court of Judicature, 1883, as amended August, 1898, provides that "the party opposing a Will may with his defence give notice to the party setting up the Will, that he merely insists upon the Will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the Will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, *unless the judge shall be of opinion that there was no reasonable ground for opposing the Will*" (*g*).

This rule in its original form re-enacted rule 41 (Contentious Business), the practice under which was that a next of kin who availed himself of this rule (*h*) was in the same position as a next of kin in the Prerogative Court, *i.e.*, not liable to costs (*i*): But, if he called witnesses in support of pleas of undue execution, and incapacity, or the like, his liability to costs was in the

(*d*) *Urquhart v. Fricker*, 3 Add. 58; *Hockley v. Wyatt*, 7 P. D. 239.

(*e*) 1 Phillim. 160, note (*e*) to *Dabbs v. Chisman*. See also *Lovett v. Harkness*, 1 Cas. temp. Lee, 332; *Manfield v. Shaw*, 3 Phillim. 22; *Boston v. Fox*, 29 L. J. P. M. & A. 68.

(*f*) *Martin v. Robinson*, 2 Cas. temp. Lee, 535.

(*g*) *Spicer v. Spicer*, [1899] P. 38; *Davies v. Jones*, *ibid.* 161. The words in italics were added by the Rules of the Supreme Court of August, 1898.

(*h*) If the party opposing a Will did not deliver the notice of his intention not to call witnesses until after he had delivered his plea, he lost the protection against condemnation in costs given by the above rule 41, and the question of costs was left to the discretion of the Court: *Bone v. Whittle*, L. R. 1 P. & D. 249. See also *Leeman v. George*, L. R. 1 P. & D. 542; *Davies v. Jones*, [1899] P. 161.

(*i*) *Cleare v. Cleare*, L. R. 1 P. & D. 655. There may be cases, however, where he will be condemned in costs: *Beale v. Beale*, L. R. 3 P. & D. 179. Where, however, the party opposing a Will had given notice under rule 41 that he merely insisted on the Will being proved in solemn form, and only intended to cross-examine the witnesses, it was held that the Court had no jurisdiction to condemn him in costs: *Leigh v. Green*, [1892] P. 17, distinguishing *Beale v. Beale*, L. R. 3 P. & D. 179; *Tappenden v. Lucas*, 65 L. T. 684. It must be remembered that these cases were decided under the original rule 41, which has since been amended.

discretion of the Court, and he was not, generally speaking, condemned in costs, if there was a reasonable ground for litigation (*k*). But a failure to establish pleas of undue influence and fraud was, as a general rule, followed by condemnation in costs (*l*). Now, under the amended rule, the discretion of the Court is to some extent restored. The question is whether the defendants have reasonable grounds for opposing the Will, and if they have not, they will be condemned in costs (*m*).

Order XXI. rule 18 applies only in the case of a party, opposing a Will which another party is seeking to prove in solemn form: it does not apply to the case of a party who asks for revocation of probate (*n*).

It should be observed that R. S. C. 1883, Order LXV. rule 1, provides that where any action or issue is tried by a jury, the costs shall follow the event unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order (*o*): And by the Judicature Act, 1890, s. 5, it is enacted that, "subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid" (*p*).

Very material alterations in the law, with respect to probate in solemn form of Wills relating to real estate, were effected by 20 & 21 Vict. c. 77, s. 61. Heir, &c. to be cited when

(*k*) *Bramley v. Bramley*, 3 Sw. & Tr. 430; *Ferrey v. King*, 3 Sw. & Tr. 51; *Tippett v. Tippett*, L. R. 1 P. & D. 54; *Smith v. Smith*, L. R. 1 P. & D. 239; *Cleare v. Cleare*, *ibid.* 655.

(*l*) *Summerell v. Clements*, 3 Sw. & Tr. 35; *Bone v. Whittle*, L. R. 1 P. & D. 249. See also *Ireland v. Bendall*, L. R. 1 P. & D. 194; *Harrington v. Bowyer*, L. R. 2 P. & D. 264.

(*m*) *Spicer v. Spicer*, [1899] P. at p. 39. This applies even where the defendant is a trustee and is protecting the interests of the *cestuis que trust*: *Perry v. Dixon*, 80 L. T. 297. As to the position of the official solicitor, see *Gill v. Gill*, [1909] P. 157.

(*n*) *Tomalin v. Smart*, [1904] P. 141.

(*o*) See *Morris v. Freeman*, 3 P. D. 65; *Foley v. Brogan*, 11 L. R. Ir. Ch. D. 421; *Davies v. Jones*, [1899] P. at p. 164.

(*p*) As to the construction of this section, see *London County Council v. Overseers of West Ham*, [1892] 2 Q. B. 173; *Re Fisher*, [1894] 1 Ch. 453. And see *post*, p. 284.

a Will affecting real estate is proved in solemn form.

S. 62.

Where the validity of the will is decided on, the decree of the Court is to be binding on the persons interested in the real estate :

S. 63.

provided they have been cited.

Liability to costs of heir-at-law when cited.

When costs decreed out of the estate, when to be paid by the unsuccessful party.

Rule 78.

Order for citation of heir, &c.

the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). One of the great objects of that Act was to prevent the possibility of a double trial on the same Will: And accordingly it is enacted by sect. 61, that where the validity of a Will affecting real estate is disputed, on proving it in solemn form or any other contentious cause, the heir-at-law, devisees, &c., shall be cited. And by sect. 62, after proof in solemn form, or where the validity of the Will is otherwise decided on, the decree of the Court shall be binding on all persons interested in the real estate.

But by sect. 63, it is provided that the probate, decree, or order of the Court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party (*q*).

The position of an heir-at-law cited under the 61st section is similar to that of the next of kin when cited to see proceedings in the Prerogative Court, and therefore, though if he contents himself with putting the executor to proof of the Will, and cross-examining the witnesses, he is not liable to costs, yet if he places pleas of undue influence and fraud on the record, and fails in proof of them, he is liable to costs (*r*).

The inquiry as to the cases in which costs will be decreed out of the estate of the deceased, and the general question as to when the unsuccessful party will be condemned in costs, will be discussed hereafter (*s*).

By rule 78 (Contentious Business), it is ordered that "any person proceeding to prove a Will in solemn form, or to revoke the probate of a Will, may, if the Will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorizing him to cite the heir or heirs-at-law or other person or persons having or pretending interest in such real estate to see proceedings; and the judge or registrar on being satisfied by affidavit that the Will in question does affect or purport to

(*q*) See *Rayson v. Parton*, L. R. 2 P. & D. 38. These sections and others connected with and following them will be found stated verbatim, and the whole subject of the probate of disputed Wills (including Wills affecting real estate) will be considered, in a subsequent part of this Treatise, together with the inquiry as to the effect of probate generally: *Post*, Pt. I. Bk. VI. Ch. I.

(*r*) *Fyson v. Westrope*, 1 Sw. & Tr. 279.

(*s*) Pt. I. Bk. IV. Ch. II. § VII.

affect the real estate, will make an order authorizing the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid; provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires" (t).

Probate Rule 109 (Nov. 20th, 1897), made in consequence of the Land Transfer Act, 1897, provides that "all rules, orders, and instructions, and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897." As a result, the position of the heir-at-law, both as regards costs, and his right to be cited to see proceedings, is now practically governed by the same rules as apply to the next of kin of the deceased (u).

Probate Rule of 20th Nov., 1897, under Land Transfer Act, 1897.

SECTION V.

Evidence in Testamentary Causes.

It is now proposed to consider some rules of evidence with respect to the admission of disputed Wills to probate.

By the Court of Probate Act, 1857 (21 & 22 Vict. c. 77), s. 33, "The rules of evidence observed in the Superior Court of Common Law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court of Probate."

Court of Probate Act, 1857, s. 33.

Rules of evidence in common law Courts to be observed.

By the common law the evidence of all persons having an interest, and the husbands or wives of such persons, was inadmissible, but this rule has been abrogated by statute.

By common law evidence of interested persons inadmissible.

By stat. 1 Vict. c. 26, s. 17, it is enacted, "That no person shall, on account of his being an executor of a Will, be incompetent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof."

Competency of executor under 1 Vict. c. 26, s. 17.

(t) Where an executor propounds the latter of two Wills, the Court will direct a citation to issue against the devisees under the earlier Will and against the heir-at-law, although already before the Court as defendant in the suit: *Lister v. Smith*, 3 Sw. & Tr. 53. The fact of one co-heir being an infant and child of a plaintiff is no ground for the Court refusing to allow such co-heir to be cited: *Nichols v. Binns*, 1 Sw. & Tr. 19. In this case Sir C. Cresswell observed, that the 61st and 63rd sections do not seem quite consistent: The former is more imperative in its terms than the latter.

(u) See *Twist v. Tye*, [1902] P. at p. 98.

Executor who is also legatee is a competent witness if he has released his legacy.

Competency of witnesses and parties under 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, 17 & 18 Vict. c. 47.

Witnesses may be summoned and examined *vide voce*.

Mode of taking evidence in contentious matters under Court of Probate Act, 1857, s. 31.

Sect. 32. Court may issue commissions or give orders for examination of witnesses abroad or who are unable to attend.

This section rendered an executor, who was also entitled to a legacy in that character, a competent witness to support the Will, if he had released his legacy (*w*).

And by stat. 6 & 7 Vict. c. 85 (which was held to apply to proceedings in the Ecclesiastical Court) (*x*), competency is conferred on interested witnesses generally; and by stat. 14 & 15 Vict. c. 99, s. 2, on parties to suits; and by stat. 16 & 17 Vict. c. 83, s. 1, on husbands and wives of parties.

By stat. 17 & 18 Vict. c. 47, "In any suit or proceeding depending in any Ecclesiastical Court in England or Wales, the Court (if it shall think fit) may summon before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition or affidavit; and notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the Court shall direct."

By stat. 20 & 21 Vict. c. 77, s. 31, "Subject to the regulations to be established by such rules and orders as aforesaid, the witnesses, and where necessary, the parties, in all contentious matters, where their attendance can be had, shall be examined orally by or before the judge in open Court; provided always, that, subject to any such regulations as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party, orally in open Court as aforesaid; and after such cross-examination, may be re-examined, orally in open Court as aforesaid, by or on behalf of the party by whom such affidavit was filed."

And by sect. 32, it is provided, "That where a witness in any such matter is out of the jurisdiction of the Court, or where, by reason of his illness or otherwise (*y*), the Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court, to order the examination of such witness on oath, upon

(*w*) *Munday v. Slaughter*, 2 Curt. 72.

(*x*) This Act did not repeal any of the provisions of the Wills Act.

(*y*) *Seo Brown v. Brown*, L. R. 1 P. & D. 720.

interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose; and all the powers given to the Courts of Law at Westminster by the Acts of the thirteenth year of King George the Third, chapter sixty-three, and of the first year of King William the Fourth, chapter twenty-two, for enabling the Courts of Law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such Courts, and to enforce such examination, and all the provisions of the said Acts, and of any other Acts, for enforcing or otherwise, applicable to such examination, and the witnesses examined, shall extend and be applicable to the said Court of Probate, and to the examination of witnesses under the commissions and orders of the said Court, and to the witnesses examined, as if such Court were one of the Courts of Law at Westminster, and the matter before it were an action pending in such Court."

Formerly the general rule was, that if a party be put to proof of a Will, he must examine the attesting witnesses.

Attesting
witnesses :

But since the passing of the Court of Probate Act, 1857, sect. 33 (z), it has not been necessary to call both the attesting witnesses to prove the execution; for in the Courts of Law the execution of a Will may be proved by calling one only of the attesting witnesses (a).

not necessary
to call both.

In the Ecclesiastical Courts on affidavit that an attesting witness had been diligently sought, and could not be found, an executor might pray publication; but the other party had a right to a monition against the witness to attend for cross-examination, if they could discover him (b).

Practice in
Ecclesiastical
Courts where
attesting wit-
ness could not
be found.

(z) See *ante*, p. 245.

(a) *Belbin v. Skeats*, 1 Sw. & Tr. 148; *Forster v. Forster*, 33 L. J. P. M. & A. 113; *Coles v. Coles*, L. R. 1 P. & D. 70; *Bowman v. Hodgson*, L. R. 1 P. & D. 362. In *Mackay v. Rawlinson*, 35 T. L. R. 223, an undefended probate action, the Court allowed the execution of the Will to be proved by the solicitor who prepared it and was present at its execution, though not an attesting witness. The learned judge, however, appears to have accepted the statement of counsel that it was not essential to call an attesting witness, and the authorities were not brought to his notice. Where the party propounding a Will in a contested suit called one of the attesting witnesses who gave evidence against the due execution, Sir C. Cresswell held that he was bound to call the other attesting witness: *Owen v. Williams*, 32 L. J. P. M. & A. 159. An attesting witness who gives evidence against due execution may be cross-examined by the party on whose behalf he is called, although not a hostile, but only an adverse, witness; for he is not the witness of either party, but of the Court: *Coles v. Coles*, L. R. 1 P. & D. 70; *Jones v. Jones*, 24 T. L. R. 339.

(b) *Mynn v. Robinson*, 1 Hagg. 68. Where the attesting witness

There has already been occasion to show (*c*) that a Will may be admitted to probate, as duly executed under the Wills Act, notwithstanding the attesting witnesses may have no recollection at all as to the circumstances attending the execution, or notwithstanding one only should affirm and the other negative, or even both should negative a compliance with the statute, or the capacity of the testator (*d*).

Doctrine of Ecclesiastical Courts as to mode of proving handwriting:

in Common Law Courts prior to Common Law Procedure Act, 1854.

Rule that on proof of signing, instructions and knowledge of the contents shall be presumed:

The Ecclesiastical Court always allowed witnesses skilled in the examination of handwriting and detection of forgeries to depose to their opinion, *upon comparison* of the writing in question with other documents admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; whereas, in the Common Law Courts, this mode of evidence was rejected until the passing of the stat. 17 & 18 Viet. c. 125 (*e*).

Generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and evidence of the Will having been read over to the testator, or of instructions having been given, is not necessary (*f*): for when an instrument has been executed by a competent person, it must be presumed that the party so executing knew the contents and the effect of the instrument, and that he intended to give that effect to it (*g*).

is dead, or insane, or absent in a foreign country, or not amenable to the process of the superior Courts, or where he cannot be found after diligent inquiry, evidence of the witness's handwriting has always been admissible: Roscoe's Nisi Prius Evidence, 17th edit. p. 133. In a suit for revocation of probate on the grounds of undue influence and incapacity where it appeared that every effort had been made to find one of the attesting witnesses but without success, the Court allowed the affidavit made by him eight years before at the time of proving the Will in the District Registry to be admitted as evidence of execution and capacity: *Gornall v. Mason*, 12 P. D. 142. Cf. *Hayes v. Willis*, 75 L. J. P. M. & A. 86. But see *Cook v. Tomlinson*, 24 W. R. 851. See also *Millar v. Sheppard*, 2 Cas. temp. Lee, 520, as to proving the handwriting of a witness when residing in an enemy's country.

(*c*) *Ante*, p. 76 *et seq.*

(*d*) See *ante*, p. 25.

(*e*) By sect. 27, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of the witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

(*f*) *Billinghurst v. Vickers*, 1 Phillim. 187, 191; *Cleare v. Cleare*, L. R. 1 P. & D. 655.

(*g*) *Fawcett v. Jones*, 3 Phillim. 476; *Wheeler v. Alderson*, 3 Hagg. 587; *Browning v. Budd*, 6 Moo. P. C. 435. Approbation will have the effect of prior instructions: *Forfar v. Heastie*, 2 Cas. temp. Lee,

Although the rule of the Roman Law, that “*Qui se scripsit hæredem*” could take no benefit under a Will, does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true Will of the deceased (*h*).

where the
legatee is the
writer of his
legacy :

Where the testator is blind, it must be proved that the contents of the Will were known to the deceased: for his execution, or other acknowledgment of the Will, is not

where the
testator is
blind or
cannot read :

310; *Durnell v. Corfield*, 1 Robert. 56. Indeed, it was at one time held that a testator may, if he likes, authorize another person to make a Will for him, and may say, “I do not know what you have put down, but I am quite ready to execute it,” and such a Will would be admitted to probate: per Sir C. Cresswell, *Cunliffe v. Cross*, 3 Sw. & Tr. 38. Accordingly that learned judge held a plea that an alleged codicil was not prepared in conformity with the intentions of the deceased, and the deceased, at the time of the execution of the alleged codicil, was ignorant of the contents thereof, to be bad on demurrer: *Cunliffe v. Cross*, 3 Sw. & Tr. 37. See also *Middlehurst v. Johnson*, 30 L. J. P. M. & A. 14. But in *Hastilow v. Stobie*, L. R. 1 P. & D. 64; 35 L. J. P. M. & A. 18; *S. C.*, 11 Jur. N. S. 1039, Sir J. P. Wilde held a plea “that the deceased did not know and approve of the contents of the Will” to be good. And it is now well established that the testator’s knowledge and approval of the contents of the alleged Will is part of the burden of proof assumed by every one who propounds the document: *Cleare v. Cleare*, L. R. 1 P. & D. 655; *In the goods of Hunt*, L. R. 3 P. & D. 250; *Sutton v. Sadler*, 3 O. B. N. S. 88, 99; *Karunaratne v. Ferdinandus*, [1902] A. C. 405, 413; *In the estate of Meyer*, [1908] P. 353. Accordingly, the Court will refuse probate of a document executed by mistake: *In the goods of Hunt*, L. R. 3 P. & D. 250; *In the estate of Meyer*, [1908] P. 353. By this, however, it is not intended that a man shall not be allowed to confide in his friend or solicitor, and depute him to draw up his Will, and adopt it when so drawn up; nor, in Wills containing complicated limitations, does the law require that the testator should understand each limitation which the solicitor in whom he has confided has thought proper to insert. See *Parker v. Felgate*, 8 P. D. 171, in which case it was held that if a testatrix has given instructions for her Will and it is prepared in accordance with them, the Will will be valid, though at the time of execution the testatrix merely recollects that she has given those instructions but believes that the Will is in accordance with them. See *Goodacre v. Smith*, L. R. 1 P. & D. at p. 360; *Perera v. Perera*, [1901] A. C. at p. 361. And see *post*, p. 254.

(*h*) See *ante*, p. 84 *et seq.*; *Dufaur v. Croft*, 3 Moo. P. C. 136; *Durnell v. Corfield*, 1 Robert. 51; *Barry v. Butlin*, 2 Moo. P. C. 480; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Brown v. Fisher*, 63 L. T. 465; *Tyrell v. Painton*, [1894] P. 151; *Wilson v. Bassil*, [1903] P. 239; *Spiers v. English*, [1907] P. 122; *Finny v. Govett*, 25 T. L. R. 186; *Low v. Guthrie*, [1909] A. C. 278.

sufficient, and the same, where from want of education, or from bodily affliction, he is unable to read (*i*).

where the capacity of the testator is doubtful:

So it is an established rule in the Probate Court, that where the capacity of the testator is doubtful at the time of execution, there must be proof of instruction, or of reading over, or other satisfactory evidence, of some kind, that he knew and approved of the contents of the Will (*k*). But this rule only applies, or at least only applies with any stringency, where the instrument is inofficious, *i.e.*, not consonant to the testator's natural affections and moral duties, or where it is obtained by a party materially benefited (*l*). In a case where a Will had been propounded in a *condidit* (*m*), and the three attesting witnesses only had been examined: The testatrix was upwards of eighty years of age and very infirm, deaf and almost blind, and the instrument had been drawn up from directions given by the executor, who was partially the residuary legatee, and no instructions were proved to have been given by the deceased: Sir H. Jenner Fust pronounced against the validity of the Will, not on the supposition of any fraud having been practised, but on the ground of failure of proof (*n*).

seaman's Will in favour of his agent.

Where the alleged Will of a seaman is in favour of his agent, there must be clear proof not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect (*o*).

Proof of Will by mere evidence of handwriting of attesting witnesses.

Under certain circumstances, the validity of a Will may be established by proving the handwriting of the attesting witnesses, though no evidence can be given, either of instructions, or of the handwriting of the deceased (*p*).

Parolevidence respecting the

In a Court of Construction, when the *factum* of the instru-

(*i*) *Ante*, pp. 13, 14. See Rule 71, P. R. 1862 (Non-Contentious).

(*k*) *Ante*, p. 85; *Billinghurst v. Vickers*, 1 Phillim. 193; *Paske v. Ollat*, 2 Phillim. 323; *Ingram v. Wyatt*, 1 Hagg. 384; *Barry v. Butlin*, *ante*, p. 84; *Mitchell v. Thomas*, 6 Moo. P. C. 137; *Browning v. Budd*, 6 Moo. P. C. 430.

(*l*) *Brogden v. Brown*, 2 Add. 449; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Brown v. Fisher*, 63 L. T. 465; *Tyrell v. Painton*, [1894] P. 151.

(*m*) A *condidit* was in ecclesiastical law the name of a plea entered by a party to a libel—*i.e.*, a claim in the Ecclesiastical Court—in which it was pleaded that the deceased made the Will the subject of the suit, and that he was of sound mind.

(*n*) *Sankey v. Lilley*, 1 Curt. 402. See also *Harwood v. Baker*, 3 Moo. P. C. C. 282; *Dufaur v. Croft*, 3 Moo. P. C. C. 136; *Tyrell v. Painton*, [1894] P. at p. 157; *Finny v. Govett*, 25 T. L. R. 186.

(*o*) *Zacharias v. Collis*, 3 Phillim. 202. See *ante*, p. 36.

(*p*) *Anderson v. Welch*, 1 Cas. temp. Lee, 577.

ment has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator (*q*): But in the Court of Probate the inquiry is not so limited; for there the intentions of the deceased, as to what shall operate as, and compose his Will, are to be collected from all the circumstances of the case taken together (*r*). They must, however, be circumstances existing at the time the Will is made (*s*).

If there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted, under some circumstances, in the Court of Probate, to explain the intention of the testator. By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it: As, whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge: whether a codicil was meant to republish a former or a subsequent Will (*t*): or whether a codicil, purporting on its face to confirm

intention of the testator as to what shall operate as and compose his Will:

receivable if there is an ambiguity on the *factum*:

what is such an ambiguity:

(*q*) See *Re Bywater*, 18 C. D. 17.

(*r*) *Greenough v. Martin*, 2 Add. 243; *Methuen v. Methuen*, 2 Phillim. 426; *Thorne v. Rooke*, 2 Curt. 799; *In the goods of English*, 3 Sw. & Tr. 586; *Robertson v. Smith*, L. R. 2 P. & D. 43; *Jenner v. Finch*, 5 P. D. 106; *Chichester v. Quatrefores*, [1895] P. 186; *Townsend v. Moore*, [1905] P. 66; *In the estate of Bryan*, [1907] P. 130; *Vines v. Vines*, [1910] P. 147. See also the cases collected, *ante*, p. 80, note (*d*).

(*s*) *Stockwell v. Ritherdon*, 1 Robert. 661, 658; 6 Notes of Cas. 415, per Sir H. J. Fust; and see the cases referred to in the preceding note: but in *Gould v. Lakes*, 6 P. D. 1, it was held that statements of a testatrix whether made before or after the execution of the Will are admissible to show what papers constitute the Will.

(*t*) *Lord St. Helens v. Lady Exeter*, 3 Phillim. 461, note (*g*). There the testator left a Will, dated 13th Dec. 1800, and a codicil all in his own handwriting beginning, "This is a codicil to my last Will and testament of the 10th Jan. 1798, and I do hereby ratify and confirm my said Will:" On the part of the executors it was alleged that at the time of the execution of the codicil the deceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former Will, which it was to be presumed had been destroyed, as it could not be found: Parol evidence was admitted to prove this allegation, and show this mistake: and the codicil was pronounced a codicil to the Will of December, 1800. But see *Walpole v. Cholmondeley*, 7 T. R. 138; *In the goods of Good-enough*, 2 Sw. & Tr. 141; *In the goods of Chapman*, 1 Robert. 1; *Payne v. Trappes*, 1 Robert. 583. These cases proceeded on the ground that parol evidence of the mistake was *not* admissible. In *In the goods of Steele*, L. R. 1 P. & D. 575, Lord Penzance gave effect to the testator's intention, not by following *Lord St. Helens v. Lady Exeter*, but by

other codicils of dates subsequent to that of its own execution, was correctly dated (*u*): these are matters of ambiguity upon the *factum* of the instrument.

the ambiguity must be on the face of the instrument: and be completely removed by the proposed proof: when no ambiguity on face of the instrument, parol evidence inadmissible.

But it was considered as a rule in the Prerogative Court, that, in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, *the ambiguity must be upon the face of the paper*; and further, the facts alleged and to be proved must *completely* remove that ambiguity (*v*). When no ambiguity whatever appears upon the face of the instrument, the Court will not admit parol evidence: Thus in the case of *Fawcett v. Jones* (*w*), the allegation stated in substance that the residuary clause of the Will was not co-extensive with the instructions given by the party deceased, and the allegation also contained an averment (which it was proposed to support by parol evidence only), suggesting that such variation was not made by any directions received from the deceased, nor with his privity or knowledge, but through mere error and oversight of the drawer, and of the testatrix herself; and the Court was prayed to pronounce for the part of the instructions so alleged to have been omitted as part of the Will: But Sir John Nicholl, in a very elaborate judgment, in which all the previous cases upon the subject are collected and commented upon, refused to admit the allegation, on the ground that the Will had been regularly executed, and there was no ambiguity apparent upon the face of it.

It was said that as to undue omissions or insertions in Wills, the result prior to the Wills Act of the authorities connected with this subject is, that where these two conditions are satisfied, viz., (1) Some absurdity or ambiguity on the face of the Will ascribable to something either omitted or inserted; and (2) Clear and satisfactory proof that the insertion or omission was con-

holding that the reference to the revoked Will by its date alone was not sufficient to revive it. This decision has been followed in *In the goods of Ince*, 2 P. D. 777, and *In the goods of Gordon*, [1892] P. 228; but on this footing the cases are hard to reconcile with *In the goods of Reynolds*, L. R. 3 P. & D. 35.

(*u*) *In the goods of Thomson*, L. R. 1 P. & D. 8. In the case of *Reffell v. Reffell*, L. R. 1 P. & D. 139, the Court held that parol evidence is admissible to prove that a Will was executed on a date other than that which appears upon the face of it; and see *In the goods of Allchin*, L. R. 1 P. & D. 664.

(*v*) *Fawcett v. Jones*, 3 Phillim. 434; *Draper v. Hitch*, 1 Hagg. 678; *Harrison v. Stone*, 2 Hagg. 550; *Shadbolt v. Waugh*, 3 Hagg. 570; and see *Sandford v. Vaughan*, 1 Phillim. 128.

(*w*) 3 Phillim. 434.

trary to the intention of the testator; the Court is at liberty, and even bound, to pronounce for the Will, not in its actual state, but with such error first reformed or corrected, either by the insertion of the passage omitted, or by the omission of that inserted.

With respect to Wills made on and after January 1, 1838, it is plain that, by reason of the provisions of the statute 1 Vict. c. 26, the whole of every testamentary disposition must be in writing, and signed and attested pursuant to the Act: Whence it follows, that the Court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends (*x*). The Court, however, has power, if words have been inserted in a Will by fraud (*y*), or by mistake, without the knowledge of the testator (*z*), to correct the error by omission of words so inserted, and, to negative the knowledge of the testator, to refer to the instructions, but the Court has no power to supply words accidentally omitted from a Will (*a*).

Omissions cannot be supplied from the instructions in any case in Wills made after Jan. 1, 1838. 1 Vict. c. 26. Power of Court to correct error in case of fraud or mistake without knowledge of testator:

In the case of *Morrell v. Morrell* (*b*), where a testator in the instructions for his Will directed that all his B shares should be given to his nephews, but the word "forty" was inserted in the Will before the word "shares" in several places, and the jury found that the word "forty" was introduced by mistake, *that the clauses including the word were never read over to the testator*, and that he only approved of the Will upon the supposition that all his B shares, viz., 400, were given to his nephew; it was ordered that the word "forty" wherever it occurred should be struck out. Sir James Hannen, in the course of his directions to the jury, said, "There can be no graver question brought into a Court of law than the question,

by striking out words introduced without authority and not read over to the testator:

(*x*) *In the goods of Wilson*, 2 Curt. 853; *Stanley v. Stanley*, 2 Johns. & H. 491; *Harter v. Harter*, L. R. 3 P. & D. 11. See also *Birks v. Birks*, 4 Sw. & Tr. 23, 31; 34 L. J. P. M. & A. 92; per Sir J. P. Wilde; *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, where that learned judge stated the general rules which, since the Wills Act, ought to govern questions of this nature.

(*y*) *Allen v. Macpherson*, 3 Phillim. 455; *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 116.

(*z*) *In the goods of Duane*, 2 Sw. & Tr. 590; *In the goods of Oswald*, L. R. 3 P. & D. 162; *In the goods of Gordon*, [1892] P. 228; *In the goods of Moore*, [1892] P. 378. And see *Rhodes v. Rhodes*, I. R. 7 A. C. at p. 198; *In the goods of Boehm*, [1891] P. at p. 251; *Briscoe v. Baillie-Hamilton*, [1902] P. 234; *Vaughan v. Clerk*, 87 L. T. 144; *In the estate of Wrenn*, [1908] 2 Ir. R. 370.

(*a*) *Harter v. Harter*, L. R. 3 P. & D. 11.

(*b*) 7 P. D. 68, 70, 75.

what is a man's last Will when he is dead and no longer able to speak for himself, and his property has to be distributed according to the particular words that have been used in a particular instrument. The law has established certain rigid safeguards in order to have attested evidence of what such intention was; and no amount of proof that a man intended to give to A or B the whole or part of his property avails. He must put his intentions in writing, and that writing and his signature to it must be attested by two witnesses. If, therefore, a mistake is made, it matters not how plainly, in leaving out words, however much you may regret their omission, we cannot after his death correct that, because his intention would not have been put in writing and attested as the law requires. There is a second class of mistake, viz., where words are inserted of which the testator knows nothing. To take a familiar instance, suppose people about the testator at the time of his death take his instructions to leave his property to certain persons and fraudulently introduce into the Will their own names instead, and say, 'I leave to Tom Smith 10*l.*', &c., and never read that to him. In that case you may strike out the passage, because he did not know it was there or intend that it should be, and therefore it was not his Will in any sense of the word. But there is another case, and this case is somewhat of that kind—it is the case of a man who feels himself unable to express his intentions in a legal and formal manner, and who confides to somebody else the duty of expressing them. I should say that in the majority of cases where a lawyer is employed that is the state of things. The testator prefers to rely on the judgment and skill of a trained mind to express his wishes rather than to run the risk of selecting words himself, and when that is the case he adopts the words used by that person just as though they were his own. There is no difference between the case of his referring it to a particular person to express his wishes who makes the mistake, and himself, knowing what his own wishes are and setting about to express them, making the mistake. He might foolishly attempt to use technical language; if, for instance, he had put down heir-at-law when in fact he meant next of kin, he must bear the consequences; and so if he trusts to anybody else to express his wishes and adopts the words used by that person as his own, then that alone can remain as the evidence of his intention."

Sir James Hannen in his judgment in the same case, delivered

after the findings of the jury, said: "The jury found that the testator never authorized the introduction of the word 'forty' in the Will, and never heard that it had been introduced, and that he executed the Will in the belief that it had carried out his instructions. In the case of *Harter v. Harter* (c) I held that the language of a Will could not be changed where a testator had seen the words and adopted them; but in *Fulton v. Andrew* (d), where a residuary bequest was introduced into a Will without the knowledge and authority of the testator, the clause containing the bequest was rejected. If so, the same principle may be applied to a single word, and therefore on the ruling of the House of Lords, in *Fulton v. Andrew* (d), I hold that the words may be struck out which had been introduced without the authority of the testator." The Court accordingly directed that the word "forty" be struck out of the Will in the four places in which it occurred in the Will (e).

secus, where testator has seen the words and adopted them :

So in the case of *Collins v. Elstone* (f) a testatrix, who had made a Will and a codicil thereto, made a second Will, which disposed only of a small policy of insurance on her life and was prepared for her on a printed form by one of her executors. This form commenced with a clause revoking all previous testamentary dispositions; but when this was read over to her she objected to it, saying she did not wish to revoke her first Will and codicil; but she executed the second Will as read over to her, being satisfied by the assurance of her executor who told her that as the second Will related only to the insurance policy, the words of revocation would not apply to her former testamentary dispositions, and that to make an erasure might invalidate the Will. It was held on the authority of *Morrell v. Morrell* that the testatrix must be taken to have known and approved of the words of revocation and that probate of the second Will must go with those words included, and that the earlier Will and codicil could not be admitted to probate.

although under an erroneous impression as to their effect :

Speaking generally, apart from fraud, the fact that a Will has been duly read over to a capable testator on the occasion of

(c) L. R. 3 P. & D. 11, 22.

(d) L. R. 7 H. L. 448.

(e) *Morrell v. Morrell*, 7 P. D. 68. See also *Rhodes v. Rhodes*, L. R. 7 A. C. 192; *In the goods of Boehm*, [1891] P. 247.

(f) [1893] P. 1. See also *Beamish v. Beamish*, [1894] 1 Ir. 7; *Garnett-Bottfield v. Garnett-Bottfield*, [1901] P. 335; *Gregson v. Taylor*, [1917] P. 256.

its execution, or that its contents have been brought to his notice in any other way, should, when coupled with its execution, be held conclusive evidence that he approved of, as well as knew the contents thereof (*g*).

but it is now settled that words cannot be inserted or substituted.

In the case of *In the goods of Bushell* (*h*), Butt, J., granted probate of a Will with the word "Bristol" substituted for "British," which latter word had been inserted in the Will by mistake in copying the draft Will; and in the case of *In the goods of Huddleston* (*i*) the same learned judge allowed the word "including" to be substituted for "excluding." But in the case of *In the goods of Walkeley* (*k*), where the engrossing clerk had copied the number of one house twice over and omitted the number of another house, and the Will was read over to the testatrix but the clerical error was not discovered till after her death, Sir F. H. Jeune said his difficulty was as to putting a number in, not in striking a figure out, though he knew that in *In the goods of Bushell* it was boldly done, and he declined to permit the insertion of the correct number, but struck out the number inserted by mistake, leaving a blank in its place. And in *In the goods of Schott* (*l*) the same learned judge, upon an application to rectify a clerical error in the residuary clause by substituting the word "residue" for the word "revenue," held that words might be struck out but nothing could be inserted, and in his judgment, referring to the two above-mentioned decisions of Mr. Justice Butt, said that "Both of the cases cited were decided by the same learned judge. I am afraid it must be admitted that upon this point of probate practice the late Sir Charles Butt was heretical. I find that a note has been put in manuscript in the margin of *In the goods of Bushell* in my copy of the Law Reports. It is in these words: 'By the President's direction this is not to be followed. Note of order of judge may be put in margin of Probate.' The

(*g*) *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 116; *Atter v. Atkinson*, L. R. 1 P. & D. 665. But there is no unyielding rule of law that where a testator, competent in mind, has had a Will read over to him and has thereupon executed it, that all further inquiry is shut out: *Fulton v. Andrew*, L. R. 7 H. L. 448. And see *Goodacre v. Smith*, L. R. 1 P. & D. 359; *Garnett-Bottfield v. Garnett-Bottfield*, [1901] P. at p. 341; *Brisco v. Baillie-Hamilton*, [1902] P. 234; *Gregson v. Taylor*, [1917] P. 256.

(*h*) 13 P. D. 7.

(*i*) 63 L. T. 255.

(*k*) 69 L. T. 419.

(*l*) [1901] P. 190.

President at that time was Sir James Hannen, who, I am informed by the registrar, would not allow the order made by Sir Charles Butt to be carried out in practice. Under these circumstances, I think these two decisions of Sir Charles Butt must now be said to be finally disposed of. I make an order in the present case to strike out the words 'revenue of the said' from the residuary clause" (*m*). It is then left to and is the province of the Court of Construction, *i.e.*, the Chancery Division, to determine the meaning and effect of the Will.

A verdict in an action of ejectment, brought for the purpose of trying the validity of a Will as to realty, was not admissible in an allegation in a testamentary cause, respecting the same Will, in the Ecclesiastical Court (*n*).

Not only when the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making of the Will, the declarations of the testator are admissible in evidence respecting his dislike or affection for his relations, or those who appear in the Will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property (*o*).

In order to rebut the presumption which exists that unattested alterations appearing on the face of a Will were made after the execution (*p*), it is allowable to give evidence of declarations of the testator, made *before* the execution, of his intention to provide by his Will for a person who would be unprovided for without the alterations in question; but the testator's declarations, made *after* the execution, to the effect that alterations had been made previously to the execution of the Will are inadmissible (*q*).

Verdict in ejectment: inadmissible in a testamentary cause.

In what cases the declarations of the testator are admissible in evidence.

To rebut presumption that unattested alterations were made after execution, declarations made *before*, but *not after*, execution of Will admissible.

(*m*) See also *Vaughan v. Clerk*, 87 L. T. 144. But where the rejection of part alters the sense of the remainder, *quære* whether there is a valid Will within the meaning of 1 Vict. c. 26, s. 9: *Rhodes v. Rhodes*, 7 A. C. 192. But see *In the goods of Boehm*, [1891] P. at p. 251.

(*n*) *Grindall v. Grindall*, 3 Hagg. 250.

(*o*) *Doe v. Palmer*, 16 Q. B. 741, 759.

(*p*) *Ante*, p. 96.

(*q*) *Doe v. Palmer*, *ubi supra*, at p. 756. See also *Williams v. Ash-ton*, 1 J. & H. 115; *In the goods of Adamson*, L. R. 3 P. & D. at p. 256; *Sugden v. Lord St. Leonards*, 1 P. D. 154, 228, 229; *Dench v. Dench*, 2 P. D. 60. So where the name of the executor appointed by a Will was written on an erasure, the Court admitted a declaration of the testator as to the person he had appointed executor, made before the execution of a codicil which referred to the Will: *In the goods of Sykes*, L. R. 3 P. & D. 26. An inclination to extend the ruling in *Sugden v. Lord St. Leonards*, *supra*, and to admit declarations made *after* the execution was shown in *Gould v. Lakes*, 6 P. D. 1; but see *Atkinson v. Morris*, [1897] P. at p. 47; and *post*, p. 259 *et seq.*

Declarations made *after* execution of Will admissible in some cases.

In many cases, however, the declarations of a testator, made *after* a Will has been executed are admissible, and are most important, *e.g.*, in questions of testamentary capacity and fraud. Upon a question between heir and devisee as to the competency of the testator at the time of making his Will, it was held to be no misdirection to tell the jury that they might take into consideration statements made by the testator as to the dispositions contained in his Will, and which, in fact, corresponded therewith, as throwing back light on the period at which the Will was executed (a year before), and as affording means of inferring what was the state of competency at that period (*r*).

Evidence of the contents of a lost Will admissible.

The contents of a lost Will, like those of any other lost instrument, may be proved by secondary evidence, and the verbal and written declarations or statements made by a testator either contemporaneously with or prior to the execution of his Will are admissible as evidence to corroborate the other testimony as to what is in the Will, and as tending to make clear his intentions and to show what he intended his Will to contain (*s*). These declarations are not strictly evidence of the contents of the Will; they are simply evidence of the intention of the person who afterwards executes the Will; evidence of probability of a high degree in some cases, and of a low degree in others: its cogency depending very much on the nearness in point of time of the declaration of intention to the period of the execution of the Will (*t*). This secondary evidence should, however, be of extreme cogency, and such as to satisfy the Court beyond all reasonable doubt that it has really before it the testamentary intentions of the testator (*u*). But since a Will which has been destroyed *animo revocandi* cannot be revived by a subsequent codicil, for not being in existence it cannot be incorporated in or republished by such codicil by reference, it

Evidence of contents of a Will destroyed *animo revocandi* inadmissible,

(*r*) *Sutton v. Sadler*, 3 C. B. N. S. 99. See also *Whiteley v. King*, 17 C. B. N. S. 756.

(*s*) *Johnson v. Lyford*, L. R. 1 P. & D. 546; *In the goods of Sykes*, L. R. 3 P. & D. 26; *Sugden v. Lord St. Leonards*, 1 P. D. 154; *Dench v. Dench*, 2 P. D. 60; *Gould v. Lakes*, 6 P. D. 1; *Harris v. Knight*, 15 P. D. 170; *In the goods of Clements*, [1892] P. 254; *In the goods of Berry*, 65 L. T. 763; *In the goods of Attlay*, 67 L. T. 502; *Allan v. Morrison*, [1900] A. C. 604; *In the estate of Crandon*, 84 L. T. 330. See also *post*, p. 292, as to probate of a Will lost, or cancelled or destroyed by fraud or mistake, or become illegible.

(*t*) *Sugden v. Lord St. Leonards*, 1 P. D. at p. 242.

(*u*) *Woodward v. Gouldstone*, 11 App. Cas. 469, at p. 475.

follows that secondary evidence of what the contents of the destroyed Will were is not admissible, notwithstanding that a subsequent duly executed codicil may have purported to revive such Will (x).

since it cannot
be revived
by codicil.

Whether declarations of a testator, as to the contents of his Will, which is not forthcoming, made *after* its execution, are admissible to prove its contents, is a question that has been much discussed. In *Doe v. Palmer* (y), Lord Campbell said that declarations of the testator made after the Will was executed, that alterations in the Will had been made previously to its execution, would not be admissible; and in *Quick v. Quick* (z) it was decided by Lord Penzance that declarations made after the execution of the Will as to the contents were inadmissible: but in the case of *Sugden v. Lord St. Leonards* (a), the Court of Appeal, Mellish, L. J., dissenting, overruled *Quick v. Quick*, and decided that declarations of a testator made after the execution of his Will were admissible as secondary evidence of the contents. Cockburn, C. J., in the course of his judgment, said: "The admissibility of declarations made subsequently to the execution of the Will creates greater difficulty by reason of a dictum of Lord Campbell in *Doe v. Palmer*, and a decision of Lord Penzance in *Quick v. Quick*. In principle there appears to me to be no distinction. The position of the testator is the same, as respects both peculiar knowledge and motive for speaking the truth, which can be no less than the motive which he has when making statements as to his intentions prior to the execution of the Will. In the case of a holograph Will, the testator alone may know the contents. In the case of its loss, his statements afford, morally, the best evidence of the contents; yet we are asked to exclude their operation as showing the contents, though it is acknowledged that such evidence is available to rebut the presumption of revocation, and to establish what is called adherence to the Will. The adoption of such a rule would, moreover, lead to a very strange anomaly. The great majority of statements made by

Whether
declarations
made *after*
execution as
to contents of
lost Will are
admissible.

Doe v. Palmer.
Quick v.
Quick.

Sugden v. Lord
St. Leonards.

(x) *Hale v. Tokelove*, 2 Rob. 318, 330; *Newton v. Newton*, 5 L. T. N. S. 218 (reversed on appeal on another point only: 12 Ir. Ch. Rep. 118); *Rogers v. Goodenough*, 2 Sw. & Tr. 342; *In the goods of Steele*, L. R. 1 P. & D. at pp. 576, 577; *In the goods of Reade*, [1902] P. 75; and see *ante*, p. 139, n. (m).

(y) 16 Q. B. 747, 759.

(z) 3 Sw. & Tr. 442.

(a) 1 P. D. 154.

a testator, adduced for the purpose of proving adherence, are in fact statements as to the contents of the Will. But such statements of the contents of the Will, assumed to be truthful, having been admitted and acted upon for the purpose of showing that, so far as the testator was concerned, the Will was still alive, how is it possible to shut out that evidence when the contents come directly in question? . It appears to me that if, as an exception to the general rule, the evidence is admissible for the one purpose, it must be equally so for the other. How can we use evidence of the contents of a Will for an ulterior purpose, and shut out the same evidence when the contents of the Will are themselves immediately in question? As regards the two authorities referred to, it is to be observed that what was said by Lord Campbell in *Doe v. Palmer* is merely an *obiter dictum*. . . . The dictum of Lord Campbell does not really, any more than the decision in the case, affect the question of the admissibility of the declarations of a testator as to the contents of his Will where the execution is not in question. The case of *Quick v. Quick* is, however, an authority directly in point, as the contents of the Will were there sought to be proved by declarations of the testator made after its execution. Refusing to act on these declarations, Lord Penzance refused probate of the Will. Taking a different view of the law, for the reasons I have given, I cannot concur in the judgment of Lord Penzance in the case of *Quick v. Quick*, and I feel we are bound to overrule it. I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his Will, are admissible to prove its contents."

Mellish, L. J., however, dissented as to the admissibility of declarations made after the execution of the Will, saying in his judgment, "I think there is a most material distinction, as was pointed out by Lord Campbell in *Doe v. Palmer*, between declarations made before a Will is executed and declarations made subsequently. The declarations which are made before the Will are not, I apprehend, to be taken as evidence of the contents of the Will which is subsequently made—they obviously do not prove it, and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were. When a doubt is thrown on the correctness of evidence which has been given as to the contents of a Will, the decla-

rations of the testator as to what he intended to put in his Will, made either contemporaneously with, or prior to the execution of, his Will, are obviously evidence which may corroborate the other testimony as to what is contained in the Will. But, to my mind, they do not of themselves prove what were the contents of the Will, they only corroborate the other evidence which has been given of the contents, because it is more probable that the testator has than that he has not made a particular devise, or a particular bequest, when he has told a person previously that he intended to make it, inasmuch as it shows that he had it in his mind to make such a Will at the time he made that declaration. But a declaration after he has made his Will, of what the contents of the Will are, is not a statement of anything which is passing in his mind at the time, it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule, that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before, and may never happen again, for you then establish an exception which more or less throws doubt on the law. It appears to me it would be better to leave it to the legislature to make the improvement, which, in my opinion, ought to be made in our present rules with regard to the admissibility of evidence of that description."

In the case of *Woodward v. Goulstone* decided in the House of Lords (b), the case of *Sugden v. Lord St. Leonards* was commented on, and the question of the admissibility in evidence of post-testamentary declarations of a testator as to the contents of his Will discussed. Lord Herschell in the course of his speech said: "There is one other point upon which the Court below was bound by the authority of *Sugden v. Lord St. Leonards*, but which would be open to review in this House, and upon which I desire to reserve my opinion. It will be observed that the only evidence of the contents of the Will in this case are the post-testamentary declarations of the testator. If these declarations be inadmissible, then there is absolutely no evidence to support the case of those who are propounding the

*Woodward v.
Goulstone.*

Will. As the Court below came to the conclusion that even admitting them the Will was not established, and as we concur (for I believe all your Lordships concur) in that view, of course the question does not arise here for determination; but as far as I am concerned, I desire to guard against its being supposed that I hold that these post-testamentary declarations are admissible. It is a matter which has given rise to considerable difference of judicial opinion. . . . I do not desire to be understood as dissenting from the judgment of the majority of the Court of Appeal in *Sugden v. Lord St. Leonards* upon this point. I have expressed the doubts which I entertain; all I desire is to leave the question open should it hereafter come before your Lordships' House for decision."

Lords Blackburn and Fitzgerald also expressed their desire to reserve their opinion on the point, Lord Fitzgerald saying, "A good deal has been said as to the admissibility in evidence of parol statements of testators alleged to have been made after the *factum* of the Will. Upon that I wish to reserve my opinion. My impression is that, however such statements of the testator were dealt with in *Sugden v. Lord St. Leonards*, the true ground upon which such evidence ought to be received, if received at all, was not fully discussed, and it is not necessary to decide it now. Therefore I reserve my opinion upon it." The question therefore cannot be considered settled. As matters stand, the decision in *Sugden v. Lord St. Leonards* has not been overruled and is binding on the Courts, but its application will not be extended (c).

The execution or *factum* of a Will cannot be proved by hearsay.

It is settled law, however, that declarations made by a testator are not admissible to prove the execution by him of a Will conformably to the statute (d); it would be contravening the provisions of the Wills Act to prove the *factum* of a Will by hearsay, and the exercise of the testamentary power being conditional on the observance of the formalities prescribed by the statute, a man cannot by his own mere assertion establish that he has fulfilled the necessary conditions. Upon the same principle it has been decided that such declarations were inadmissible to prove that a testatrix had executed her Will in

(c) *Atkinson v. Morris*, [1897] P. at p. 47.

(d) *Doe v. Palmer*, 16 Q. B. 747, 759; *In the goods of Ripley*, 1 Sw. & Tr. 68; *Staines v. Stewart*, 2 Sw. & Tr. 320; *In the goods of Hardy*, 30 L. J. P. M. & A. at p. 143; *Sugden v. Lord St. Leonards*, 1 P. D. 154, 227.

duplicate, and had revoked the Will by destroying one of the duplicates (e).

It was held in *Keen v. Keen* (f), that declarations of a testator showing an intention to adhere to a Will are admissible in evidence to rebut the presumption of its revocation arising from its not being forthcoming after his death; and that declarations made to the contrary effect are also admissible to contradict the evidence of an intention to adhere to a non-forthcoming Will. In this case Sir James Hamen said: "Now I think there can be no doubt that while on the one hand evidence of statements made by a testator subsequent to the execution of a Will that he intends to act in conformity with the disposition contained in the Will is clearly admissible, it necessarily follows that other statements made by the testator to a contrary effect must also be admissible. The admissibility of such evidence cannot depend on the form of words in which the intention is expressed. The object of language is to convey ideas, and in the conveyance of ideas it matters not what particular form of words is used. Therefore a statement by a testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his Will, although it may not be evidence of the fact of destruction of the Will, is evidence of intention from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion."

Declarations
for proving
adherence.

SECTION VI.

The Probate of Wills of Foreigners, &c., and of British Subjects domiciled out of the Jurisdiction of the Court.

If a testator domiciled abroad dies without leaving any personal property in this country, or since the coming into operation of the Land Transfer Act, 1897, without leaving any real or personal property in this country, generally speaking, his Will need not be proved in any Court of Probate here: and, therefore, where the plaintiff, as administrator of I. S., who died at Naples, brought his bill to have a discovery of the intestate's personal effects, the defendant pleaded that the deceased had by

If the
deceased
left no pro-
perty in
this country
his Will need
not be proved
here:

(e) *Atkinson v. Morris*, [1897] P. 40.

(f) 3 P. & D. 105, 107. See also *Hale v. Tokelove*, 2 Rob. at p. 328; *Bell v. Fothergill*, L. R. 2 P. & D. 148; *Drake v. Sykes*, 23 T. L. R. 747; *North v. North*, 25 T. L. R. 322.

his Will made him, the defendant, his executor, and he had proved the Will according to the law of the country; and he denied that the deceased had left any estate but what was at Naples: and this plea was held good (*g*). But, although the maxim "*mobilia sequuntur personam*" had no application to probate duty, yet estate duty is now payable under section 1 of the Finance Act, 1894, if under the law in force before the passing of the Act, legacy or succession duty is payable in respect thereof (sect. 2 (2)) (*h*). The liability of personal estate to legacy duty depends wholly upon the domicile of the owner at the time of his death, and the local situation of the property is an immaterial circumstance (*i*). Section 8 (3) of the Finance Act, 1894, renders the executor of the deceased personally liable for the estate duty. If a testator domiciled here makes a Will disposing of his property and dies leaving foreign moveable property, but without leaving any property in this country, should there be no occasion to obtain probate here (*k*), the estate duty will be accepted on an Account (Form C—1).

estate duty on foreign moveable property will be accepted on an Account:

but if foreign executor wishes to institute a suit here he must be constituted personal representative by the Probate Division:

But if a foreign executor should find it necessary to institute a suit here, to recover a debt due to his testator, he must prove the Will here also, or a personal representative must be constituted by the Probate Division here to administer *ad litem* (*l*). So an executor having obtained probate in Ireland could not bring an action here as executor, even to recover Irish assets, without having obtained probate in England also (*m*). For the

(*g*) *Jauncy v. Sealey*, 1 Vern. 397; *post*, Pt. I. Bk. v. Ch. II. § I. As to personal property transmitted to this country after the death of the testator, see *Stubbings v. Clunies-Ross*, 27 T. L. R. 361.

(*h*) See Hanson's *Death Duties*, 6th edit. 108 *et seq.* As to the maxim "*mobilia sequuntur personam*," see *post*, p. 267, n. (*u*).

(*i*) *Thomson v. Adv.-Gen.*, 13 Sim. 153.

(*k*) Cf. observations of Sir James Hannen in *In the goods of Gunn*, 9 P. D. at p. 244; *ante*, p. 232, n. (*k*).

(*l*) *Att.-Gen. v. Cockerell*, 1 Price, 179, by Richards, B. Mitf. Pl. 177, 4th edit.; *Tyler v. Bell*, 2 M. & Cr. 89; *Att.-Gen. v. Bouwens*, 4 M. & W. 193.

(*m*) *Carter v. Crofts*, Godb. 33; *Whyte v. Rose*, 3 Q. B. 508, per Tindal, C. J. But now sealing an Irish probate or a Scotch confirmation gives them a like force and effect as if a Probate had been granted. See 20 & 21 Vict. c. 79, s. 95; 21 & 22 Vict. c. 95, s. 29, and Rule 73, P. R. 1862 (Non-Contentious): also *Divenny v. Corcoran*, 32 L. J. P. & M. 26; and *Irwin v. Caruth*, [1916] P. 23, as to Irish probates: and 21 & 22 Vict. c. 56, ss. 9, 12 and 14; 39 & 40 Vict. c. 70, s. 41, as to Scotch confirmations. Where confirmation of the executor of a person who has died domiciled in Scotland has been sealed with the seal of the Court of Probate, in manner provided by sect. 12 of 21 & 22 Vict. c. 56, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in

Courts here will not recognize any Will of personalty except such as the Court of Probate of this country has by the probate adjudged to be the last Will (*n*). Therefore, if a testator die in India, and his personal estate be wholly there, and his executor be resident there, and the Will be proved there, yet if a part of the assets remain in the hands of the executor unappropriated, and come to be administered in England, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, administration to the testator ought to be taken out in this country, and the administrator made a party to the suit (*o*). So to an action which seeks an account of the assets of an intestate, who died in India, possessed by a personal representative there, a personal representative of the intestate, constituted in England, is a necessary party, though it does not appear that the intestate, at the time of his death, had any assets in England (*p*). And it may be stated,

England, although they are specifically bequeathed, and although, by the law of Scotland, an executor cannot deal with leasehold property in that country: *Hood v. Barrington*, L. R. 6 Eq. 218. W. E. died possessed of property of small value in this country, and entitled under the Will of his uncle to large assets in Scotland which were being duly administered there. The executors of W. E. proved his Will in Scotland only. A legatee under W. E.'s Will applied for a grant of administration of the estate of W. E. in this country, which application was opposed by the executors. It was held (1) that the Court is not bound to make such a grant, but that its power is discretionary; and (2) that, it not having been shown that the executors were not doing their duty, there was no necessity for any grant in this country: *In the goods of Ewing*, 6 P. D. 19; see also the cases there cited. Further provisions as to resealing confirmations and additional confirmations or eiks are contained in 38 & 39 Vict. c. 41; 39 & 40 Vict. c. 70, ss. 41—45 (these sections meet the difficulties raised in such cases as *In the goods of Ryde*, L. R. 2 P. & D. 86); 39 & 40 Vict. c. 24; 44 Vict. c. 12, s. 34; and 57 & 58 Vict. c. 30, s. 23 (7). The object of sect. 12 of 21 & 22 Vict. c. 56 is to render unnecessary a second application for probate, but the Scotch confirmation is not conclusive evidence of the domicile, if that question has been raised in the English Court: *Hawarden v. Dunlop*, 2 Sw. & Tr. 340. As the language of the section is imperative, the act of sealing a Scotch confirmation by the English Court is merely a ministerial act; and the English Court has no discretion to refuse to reseat the confirmation on the ground that the grant is contrary to the English practice: *In the estate of Rankine*, [1918] P. 134. Where the proper duty has been paid in Scotland, no further duty is payable on resealing: *Booth's Trusts*, 1 Giff. 46. By 22 Vict. c. 30, s. 1, payments made in reliance on any instrument sealed under 21 & 22 Vict. c. 56 are protected, notwithstanding any defect affecting the validity of the confirmation.

(*n*) *Price v. Dewhurst*, 4 M. & Cr. 80, 81; *Bond v. Graham*, 1 Hare, 484; *Lasseur v. Tyrconnel*, 10 Beav. 28.

(*o*) *Logan v. Fairlie*, 2 Sim. & Stu. 284; 1 Myln. & Cr. 59. See also *Lowe v. Fairlie*, 2 Madd. 101.

(*p*) *Tyler v. Bell*, 2 Myln. & Cr. 89; *Bond v. Graham*, 1 Hare, 482. See *post*, Pt. v. Bk. II. Ch. II.

established rule that to sue in this country probate or letters of administration must be obtained here, except in case of Irish probates, Scotch confirmations, or colonial grants resealed :

but a Will made abroad of property in this country must be proved here.

as a fully established rule, that in order to sue in any Court of this country, whether of law or equity, in respect of the rights or property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in the Court of Probate of this country, except in the case of Irish probates and Scotch confirmations resealed, and of probates and letters of administration granted in British possessions and sealed by the Probate Court in the United Kingdom under the Colonial Probates Act, 1892 (*q*).

Likewise, if a Will be made in a foreign country, and proved there, disposing of personal property in this country, the executor must prove the Will here also (*r*). And generally speaking, the Court of Probate in this country will adopt the decision of the Court of Probate in the foreign country in which the testator died domiciled (*s*).

(*q*) *Whyte v. Rose*, 3 Q. B. 507. See also *M'Mahon v. Rawlings*, 16 Sim. 429; *Enohin v. Wylie*, 10 H. of L. 19, per Lord Cranworth; and see the Colonial Probates Act, 1892, *post*, p. 268. It appears from an able note to the American edition of the present Treatise (which Mr. Francis I. Troubat has done the author the honour of publishing at Philadelphia), that it has been established as a rule, by repeated decisions in many of the States, that the executor or administrator of a person who dies domiciled in Great Britain, or any other foreign country, cannot maintain an action in the United States, by virtue of letters testamentary or administration granted to him in the country where the deceased died: But that on the ground of them, an ancillary probate authority or administration will be granted: And further, that the rule just mentioned does not apply, except where the party sues in right of the deceased. If he sues in his own right, although that right be derived under a foreign Will, no administration need be taken out in the United States. See also Story's Conf. of L. Ch. viii. ss. 513, 516, 517, and the note of Mr. Asa Fish to the 5th American edition of this Work. And see accord. *Vanquelin v. Bouard*, 15 C. B. N. S. 341.

(*r*) *Lee v. Moore*, Palm. 163; *Tourton v. Flower*, 3 P. Wms. 369; *Vanthienen v. Vanthienen*, Fitzgib. 204.

(*s*) See *post*, p. 269. See *Raymond v. De Watteville*, 2 Cas. temp. Lee, 358, as to the proper authentication of a copy of a Will proved and deposited in a Court of a foreign State. R. domiciled in Mexico made a Will according to the law of Mexico. The proper Court there decreed probate of a Spanish translation and not of the original. It was held that the grant in this country must be made upon the production of an English translation of the Spanish copy and not of a certified copy of the original: *In the goods of Rule*, 4 P. D. 76. See also *In the goods of Clarke*, 36 L. J. P. & M. 72. In a case where the Will of a British subject domiciled abroad at the time of his death had been proved in the French Courts and deposited with a notary who by the law of France was forbidden to allow it to be removed from his custody, it was held that probate might be granted of a copy of the original Will properly proved, limited to such time as might elapse before the original itself should be brought in: *In the goods of Lemme*, [1892] P. 89. And see *In the goods of Von Linden*, [1896] P. 148; *In the estate of Von Faber*, 20 T. L. R. 640.

Before granting probate of a foreign Will of personal property the Court should be satisfied of one of two things, viz., either that the Will is valid by the law of the country where the testator was domiciled, or that a Court of the foreign country has acted upon it and given it efficiency (t).

All moveable (u) personal property follows the person, and the rights of a person constituted in England representative of a party deceased, *domiciled in England*, are not limited to the personal property in England, but extend to such property, wherever locally situate (x).

It must not be understood, however, that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here can extend to them, so as to give the executor the legal right to recover them abroad. For the probate was never granted except for goods which at the time of the death were within the jurisdiction of the Ordinary who made the grant (y): though if it should become necessary that the Courts of the foreign country where the assets are situate should grant probate or administration for the purpose of giving

The rights of the representative constituted here of a person domiciled here extend to personal property abroad: but the grant of probate here does not extend to it.

(t) *In the goods of Deshais*, 34 L. J. P. & M. 58; *Miller v. James*, L. R. 3 P. & D. 4. As to proof of foreign law and the qualification of an expert, see *In the goods of Klingemann*, 3 Sw. & Tr. 18; *In the goods of Prince Oldenburg*, 9 P. D. 234; *In the goods of Dost Aly Khan*, 6 P. D. 6; *In the goods of Whitelegg*, [1899] P. 267; and *Brailey v. Rhodesia Consolidated, Ltd.*, [1910] 2 Ch. 95.

(u) See *Freke v. Lord Carbery*, L. R. 16 Eq. 461, where Lord Selborne, L. C., in his judgment, says: "The doctrine depends upon a principle which is expressed in the Latin words [*mobilia sequuntur personam*]; and that is the only principle of the whole of our law as to domicile when applicable to the succession of what we call personal estate. It is so, not by any special law of England, but by the deference which, for the sake of international comity, the law of England pays to the law of the civilised world generally. Domicil is allowed in this country to have the same influence as in other countries in determining the succession of moveable estate; but the maxim of the law of the civilised world is *mobilia sequuntur personam*, and is founded on the nature of things. When '*mobilia*' are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immoveable, and not moveable. The doctrine is inapplicable to it." See also *In the goods of Tamplin*, [1894] P. 45, 46; and *post*, p. 270, note (k).

(x) *Spratt v. Harris*, 4 Hagg. 405.

(y) *Att.-Gen. v. Dimond*, 1 Cr. & J. 356. So where the deceased left a Will expressly limited to her property abroad, which was proved by her executors in the foreign Court, but she died intestate as to her property in this country, it was held that administration of her property in this country might be granted to her sole next of kin: *In the goods of Mann*, [1891] P. 293.

a legal right to recover and deal with them, such Courts, by the comity of nations, would probably follow the decision of the Court of Probate in this country, as being the country of domicile (z).

nor to Will
made here of
property in
the colonies,
&c.

Again, if a Will be made here and proved in the Court of Probate here, the probate will not extend to property in the colonies (a); though, if the testator was domiciled in this country, the Judge of Probate in the Plantations is bound by the probate here, and ought to grant it to the same person (b).

The Colonial
Probates Act,
1892.

The Colonial Probates Act, 1892 (55 & 56 Vict. c. 6), provides for the recognition in the United Kingdom under Order in Council (c) of probates and letters of administration granted in British possessions, which when sealed with the seal of the Court of Probate in the United Kingdom shall be of the like force and effect, and have the same operation in the United Kingdom as if granted by that Court; and sect. 3 extends the application of the Act to probate or letters of administration granted by British Courts in foreign countries (d).

(z) See Story's Confli. of L. Ch. xiii. ss. 512, 513, 518. The Courts of the country where the deceased was domiciled will administer the property wherever situate; but if, in the course of the administration, it becomes necessary to take legal proceedings to reduce the estate into possession, the representative constituted by the Court of the domicile will have to clothe himself with a title from the Court where the property is locally situate: by the comity of nations, however, the foreign Court will, as a matter of course, grant probate ancillary to that granted by the Courts of the domicile. In all matters, except that of procedure, the foreign Courts have no jurisdiction, unless the representatives themselves accept the jurisdiction of such foreign Court, to determine questions of construction or administration, and then the foreign Court will apply the *lex domicilii*: *Enohin v. Wylie*, 10 H. L. Cas. p. 1; *In the goods of Cosnahan*, L. R. 1 P. & D. 183; *In the goods of Hill*, L. R. 2 P. & D. 89; *In the goods of Weaver*, 36 L. J. P. & M. 41.

(a) *Burn v. Cole*, Ambl. 416; *Atkins v. Smith*, 2 Atk. 63. So a defendant who had been arrested in Ireland, by writ of *ne exeat regno* issued out of Chancery there for a debt due to an intestate, was discharged, on the ground that the plaintiff had not obtained administration in that country: *Swift v. Swift*, 1 Ball & Beat. 326. See stat. 23 Vict. c. 5, s. 1, by which probate here is to extend to India Government notes, &c.

(b) By Lord Mansfield, Ambl. 416.

(c) Orders in Council have from time to time been made by which the Act is directed to apply to many of the British possessions. See Mortimer on Probate, 493.

(d) In *In the goods of Sanders*, [1900] P. 292, a colonial grant was resealed, although the deceased had left no estate in this country, on the application of the executors named in a Will of a third person, by which a legacy was left to the "personal representatives" of the deceased. A colonial grant, though limited, may be resealed in the United Kingdom, provided that the proper conditions prescribed by this Act have been complied with: *In the goods of Smith*, [1904] P. 114.

But though the executor of a man who has died domiciled in England be not able to sue in a foreign Court by virtue of an English probate (any more than he can sue in an English Court by virtue of a foreign probate), yet for the purpose of suing in an English Court, a probate obtained in the proper Court here extends to all the personal property of the deceased wherever situate at the time of his death, whether in Great Britain or the Colonies, or in any country abroad (e). So an executor having clothed himself with an English probate, might, without having obtained probate in Ireland also, sue in the Courts here to recover a debt which was *bona notabilia* in Ireland (f).

An executor may sue here in respect of foreign assets without a foreign probate.

If a testator has made two independent Wills, one disposing of his property in this country and the other disposing of his property abroad, the former alone should be admitted to probate here (g). If, however, the two Wills are not independent the case is different, as where an English Will ratifies and confirms a foreign Will, it is right that the latter should be incorporated in the probate (h). According to the practice where the foreign Will is not included in the probate, a copy must be filed in the registry together with an affidavit verifying it, and a note must be appended to the probate that such affidavit has been filed (i).

Rule as to grant of probate where testator has made two Wills—one relating to foreign assets, the other of English assets.

It is now a clearly established rule that the law of the country, in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession as to movable personalty, but also regulates the decision as to what constitutes the last Will, without regard

The law of the place of domicile regulates the decision as to the validity of the Will

(e) *Spratt v. Harris*, 4 Hagg. 405; *Whyte v. Rose*, 3 Q. B. 493, 507.

(f) *Whyte v. Rose*, 3 Q. B. 493. It would, however, be a good defence to such an action that the debt had been paid to a personal representative of the deceased duly constituted in Ireland: *Ib.* 510.

(g) *In the goods of Coode*, 1 P. & D. 449; *In the goods of Astor*, 1 P. D. 150; *In the goods of Murray*, [1896] P. 65, where the earlier cases are referred to, and in which the learned judge (Gorell Barnes, J.) expressed the opinion that the Finance Act, 1894, did not affect the question what documents ought to be admitted to probate. And see *Stubbings v. Clunies-Ross*, 27 T. L. R. 361; *In the estate of Von Brentano*, [1911] P. 172; and *In the goods of Schenley*, 20 T. L. R. 127.

(h) *In the goods of Lord Howden*, 43 L. J. P. & M. 26; *In the goods of Western*, 78 L. T. 49; *In the goods of Green*, 79 L. T. 738; *Gilmer v. Overman*, 23 T. L. R. 716.

(i) *In the goods of Murray*, *ubi supra*; and see the cases cited in notes (g) and (h), *supra*.

as regards
movable
personalty :

with respect
to the validity
of the Will
of a foreigner
domiciled
abroad, the
Court will
be guided by
the law of
the place of
domicil :

the same
with respect
to the Wills
of British
subjects
domiciled
in foreign
states, who
died before
Aug. 6, 1861 :

to the place either of birth or death, or the situation of the property at that time (*k*).

Accordingly, if the deceased was a foreigner, domiciled abroad, and his Will be brought into the Court of Probate here for the purpose of being admitted to probate, the Court, in deciding whether the instrument be a valid Will or not, will be guided not by our own law, but by the law of the country where the deceased was domiciled (*l*). Thus in a case, where the testatrix was a married woman, a native of Spain, domiciled there, and it appeared upon affidavits, that by the law of Spain she had power to bequeath, as a *feme sole*, the property which she brought her husband on her marriage, probate was granted of the Will, made according to the law of that country (*m*).

And it was established by the determination of the Delegates in *Stanley v. Bernes* (*n*), that the same rule, viz., that the question of the validity of a Will of a testator domiciled abroad ought to be determined in our Courts of Probate according to the law of the country where the testator died domiciled, extends to the case of a British subject domiciled in a foreign State, notwithstanding the Will disposes of property in England. In that case the Delegates, reversing a sentence of the Prerogative Court, refused probate to two codicils, disposing solely of money

(*k*) *Craigie v. Lewin*, 3 Curt. 435; *De Zichy Ferraris v. Lord Hertford*, 3 Curt. 468, 486; *Bremer v. Freeman*, 10 Moo. P. C. 306; *Enohin v. Wylie*, 10 H. of L. 1; *Crispin v. Doglioni*, 3 Sw. & Tr. 96, 99; *Whicker v. Hume*, 7 H. of L. 124; *Miller v. James*, L. R. 3 P. & D. 4; *De Fogassieras v. Duport*, 11 Ir. R. 123; *Abd-ul-Messih v. Farra*, 13 A. C. 431; *Loustalan v. Loustalan*, [1900] P. 211. See, however, as to Wills made by British subjects dying after August 6, 1861, stat. 24 & 25 Vict. c. 114, s. 3, *post*, p. 276, and see stat. 24 & 25 Vict. c. 121. Where, however, an Austrian bastard who was entitled to a fund in Court in this country died in Vienna intestate and without heirs, the Austrian Government having claimed the fund, it was held that as the right claimed was not in the nature of a succession the maxim "*mobilia sequuntur personam*" did not apply, and that the Crown, by the law of England, was entitled to the fund as *bona vacantia*: *Re Barnett's Trusts*, [1902] 1 Ch. 847. Chattel interests in land situate in this country, although personal property for the purpose of succession, are governed, not by the law of domicile, but by the *lex loci rei sitæ*: *Freke v. Lord Carbery*, L. R. 16 Eq. 465; *Duncan v. Lawson*, 41 C. D. 394; *Pepin v. Bruyère*, [1902] 1 Ch. 24; *In re Moses*, *Moses v. Valentine*, [1908] 2 Ch. 235.

(*l*) *Curling v. Thornton*, 2 Add. 21. The French lawyers, it would seem, acknowledge the same principle. See *Collectanea Juridica*, vol. 1, pp. 331, 333; 2 Add. 22.

(*m*) *In the goods of Maraver*, 1 Hagg. 498.

(*n*) 3 Hagg. 374.

in the British funds and made by a British born subject, domiciled in the Portuguese dominions, on the ground that the instruments were not executed according to the law of Portugal (o).

And it would seem that if a British subject, domiciled in a foreign country, by his Will appoints an executor, but makes a disposition of his property, which, though valid by the law of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, *notwithstanding probate may have been granted to the executor in this country*, to hold that the Will has no operation beyond the appointing of the executor (p); and, consequently, that subject to any duties and debts he is a trustee for the next of kin, and must distribute the property exactly as if the deceased had died intestate.

When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law, but, in some instances, of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and which would not be applied to a natural born subject of that country. Thus in *Collier v. Rivaz* (q), the testator, an English born subject, died domiciled in Belgium, leaving a Will not executed according to the forms required by the Belgian law: By that law, the succession in such a case is not to be governed by the law of the country applicable to its natural born subjects, but by the law of the testator's own country: And it was held that the Will, being valid according to the law of England, ought to be admitted to probate (r). So

Will by British subject domiciled abroad valid by English law but invalid by law of country of domicile:

meaning of the term "the law of the country of domicile:"

(o) But this rule has been modified by statute as to British subjects dying after the 6th August, 1861. See 24 & 25 Vict. c. 114, *post*, p. 276.

(p) *Thornton v. Curling*, 8 Sim. 310. See also *Campbell v. Beaufoy*, Johns. 320; *Pepin v. Bruyère*, [1902] 1 Ch. 24. On the same principle it would seem that a Will of a British subject which must be held by an English Court to be duly executed by reason of 24 & 25 Vict. c. 114 (*post*, p. 276), though not in the form required by the law of the place of the testator's domicile, may still be invalid, either because the testator is according to the law of his domicile incapable of making a Will, or because the Will is materially invalid or inoperative as containing provisions contravening the law of the testator's domicile: Dicey on the Law of Domicil, p. 306; Conflict of Laws, 2nd edit., p. 672; and see *Re Grassi*, [1905] 1 Ch. 584; *Lyne v. de la Ferté*, 102 L. T. 143.

(q) 2 Curt. 855.

(r) See the observations made on this case by Lord Wensleydale in *Bremer v. Freeman*, 10 Moo. P. C. 374. See also the observations of Sir J. Hannen in *Bloxam v. Farrer*, 8 P. D. 103; and see *In the goods of Brown-Séguard*, 70 L. T. 811.

in *Maltass v. Maltass* (s), it appeared that by the law of Turkey no subject of that country can make a Will: By treaty between Great Britain and the Ottoman Empire an English domiciled subject may make a Will (t): The deceased, John Maltass, was born at Smyrna of English parents, his father having been long settled as a merchant there: The deceased was himself a member of a commercial firm at Smyrna and died there, having been constantly resident there, except that he passed his boyhood in England for the purposes of education: And it was held by Dr. Lushington (sitting for Sir H. Jenner Fust) that a Will made by the deceased in 1834, and which was good according to the law of England as it then stood, was entitled to probate: For if the testator was to be regarded as domiciled, in the legal sense, in Turkey, and if the law of domicile did prevail, the law of Turkey, in conformity with the Treaty, says, that in such case the succession to the personal estate shall be governed by the British law; if he was not domiciled in Turkey, but in England, then the law of England prevailed, *propria vigore*.—But in either point of view, the Will, in order to be valid, must have been made according to the testamentary law of England: And accordingly, Sir H. Jenner Fust refused to admit to probate a Will of the same party deceased, which had been made after the year 1837, and had not conformed to the Wills Act (u).

the rule is
the same with

Again, if the testator was a British subject, and at the time

(s) 1 Robert. 67.

(t) See 3 Curt. 231.

(u) *Maltass v. Maltass*, 3 Curt. 231. There is no such thing as domicile arising from society and not from connection with a locality. *Abd-ul-Messih v. Farra*, 13 A. C. 431, in which case it was held (approving *Re Tootal's Trusts*, 23 Ch. D. 532) that where the testator, a member of the Chaldean Catholic community having a Turkish domicile of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject, as Cairo was not a British possession governed by English law, the testator's permanent abode therein under British protection did not attach to him an English or Anglo-Egyptian domicile. The dictum of Lord Watson in that case (13 A. C. at p. 445), that residence in a foreign State as a privileged member of an ex-territorial community, although it might be effectual to destroy a residential domicile acquired elsewhere, was ineffectual to create a new domicile of choice, has since been overruled by the House of Lords in *Casdagli v. Casdagli*, [1919] A. C. 145, in which case it was held that there is no rule of law that a British resident in Egypt, who is registered as a British subject at the British Consulate, and as a consequence enjoys certain privileges and immunities by reason of the ex-territorial jurisdiction exercised by His Majesty in that country, cannot acquire an Egyptian domicile. And see *The Eumæus*, 1 Br. & Col. P. C. 605, 615.

of his death domiciled in some other part of the British dominions, out of England, the Court upon application for probate, has felt itself bound, where the death occurred before August 6th, 1861, to defer to the law of the place where the deceased was domiciled (*x*).

Upon this ground it was the practice, upon production of an exemplified copy of the probate granted by the proper Court in the country where the deceased died domiciled, for the Prerogative Court here to follow the grant upon the application of the executor, in decreeing its own probate. And the practice of the Probate Division is similar (*y*). The grant will not necessarily be a grant of probate: if the person to whom the foreign Court has made the grant is a person not entitled to the grant as executor according to the law of England, the grant will be of administration with the Will annexed (*z*). The Court has power to make such a grant of letters of administration under the 73rd section of 20 & 21 Vict. c. 77.

The extent to which the Court of Probate ought to follow a foreign grant of probate was very fully considered by Lord Penzance in the case of *In the goods of Earl (a)*. In his judgment in that case—in which the testator died domiciled in New South Wales and probate to the widow as executrix according to the tenor was granted by the Supreme Court of that Colony—the learned judge said: “In this case I took time to consider the question to what extent the Court ought to follow a foreign grant of probate, the grant having been made to the applicant by the Court of the country of domicile as executrix according to the tenor. It is admitted that the terms of the Will were not such as to constitute the applicant executrix according to the tenor in this country, but the Court is asked to follow the foreign grant in that respect. I have looked into the cases in which questions of this sort have arisen, and I find that for a long time considerable difficulty was felt as to the extent to which foreign grants should be followed,” and after discussing the several cases on the point (*b*) the learned judge said: “The

respect to the Wills of British subjects domiciled in the British dominions out of England, who died before Aug. 6, 1861. Practice of the Court here to follow the grant of the Court of domicile: but grant not necessarily a grant of probate; it may be of administration with the Will annexed.

(*x*) See stat. 24 & 25 Vict. c. 114, s. 2, *post*, p. 277.

(*y*) *Ante*, p. 266, n. (*s*).

(*z*) *In the goods of Briesemann*, [1894] P. 260; *In the goods of Von Linden*, [1896] P. 148.

(*a*) L. R. 1 P. & D. 450.

(*b*) *Larpent v. Sindry*, 1 Hagg. at p. 383; *In the goods of Read*, *ib.* at p. 476; *In the goods of the Countess da Cunha*, *ib.* 237; *In the goods of the Duchess of Orleans*, 1 Sw. & Tr. 253; *Enohin v. Wyllie*, 10 H. of L. C. 115.

result of the cases is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (as *In the goods of H.R.H. the Duchess of Orleans*) (c) have militated against the rule of following the foreign grant. . . . There was no power in the old Ecclesiastical Courts to make a grant, except in the direction indicated by the practice of those Courts. This Court, however, is armed with a special power by the 73rd section of 20 & 21 Vict. c. 77. I think the Court ought to act upon that section, and to make a grant in all such cases as the present to the person who has been clothed by the Court of the country of domicile with the power and duty of administering the estate, no matter who he is or on what ground he has been clothed with that power.

“The grant under the 73rd section will describe him as a person having that power, and thus the difficulty will be avoided of declaring that a person is executor who, according to the practice of the Court, is not executor, and of continuing a chain of executorship by persons who are executors according to the law of a foreign country, but not according to the law of this country. It is one thing to make a grant of administration and another to make a grant of probate to a person as executor, which involves many peculiar consequences. I shall make the grant of administration with the Will annexed to the applicant under the 73rd section, as the person entitled under the grant of the Court of the country of the deceased’s domicile to administer the estate” (d).

The Probate Division, however, is not merely mechanically guided by the foreign grant, but exercises its own judgment and discretion (e); thus in the case of *In the goods of Weaver* (f), the foreign grant having been made to nominees of the testator’s widow, the person entitled to the grant, upon the widow’s express consent, Lord Penzance declined to grant administra-

(c) 1 Sw. & Tr. 253.

(d) See further on this question, *In the goods of Cosnahan*, L. R. 1 P. & D. 183; *In the goods of Hill*, L. R. 2 P. & D. 89; *In the goods of Smith*, 16 W. R. 1130; *In the goods of Dost Aly Khan*, 6 P. D. 6; *In the goods of Briesemann*, [1894] P. 260; S. C., W. N. [1895] p. 32; *In the goods of Meatyard*, [1903] P. 125; *In the estate of Levy*, [1908] P. 108; *In the estate of Cocquerel*, [1918] P. 4.

(e) *In the goods of Cosnahan*, L. R. 1 P. & D. 183.

(f) 36 L. J. P. & M. 41.

The grant should be made under 20 & 21 Vict. c. 77, s. 73.

The Court, however, exercises a discretion in following the foreign grant.

tion to one of the said nominees, without the consent of the widow, the learned judge saying: "It is said the Court ought to dispense with such consent, because it is bound to follow the American grant. When the Court of a foreign country in which a person dies domiciled grants administration to one who by the law of that country is entitled to the grant, this Court, in making a grant with reference to property situate here, follows the foreign grant. But this case does not fall within that rule, for here the grant was made, not to persons entitled to it, but to persons nominated by the widow; and if the foreign law is to be followed, this Court should require, as was the case in the American Court, the widow's consent before the grant is made." The authority of the widow having been subsequently produced, the grant was made to the nominee as attorney for the widow.

In *Laneville v. Anderson* (g), it was held that where in the case of a domiciled Frenchman, the French Court had decreed that the time limited by the French law for the execution of the executorship thereby created had passed, and that the executor had no more right to intermeddle in the estate of the testator, and that the parties beneficially interested were the only persons who had a right to interfere, the Court held itself bound by such decree, and refused to grant probate (with respect to personalty in England) to such an executor. So, in *Crispin v. Doglioni* (h), Sir C. Cresswell held, that the judgment of the Court of Domicil of the deceased is binding on the Court of a foreign country, in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign Court which have been decided by the Court of Domicil (i).

When the deceased has left a Will, valid by the law of his domicile, and probate, either original or ancillary, has been obtained here, the duty of the Court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who by the law of domicile are entitled under the Will, and that being ascertained to distribute the property accordingly. The duty of administration has to be discharged by the Courts of this country, though in the performance of

Duty of Court in administering property where deceased left Will valid by law of domicile and probate has been obtained in England.

(g) 2 Sw. & Tr. 24.

(h) 3 Sw. & Tr. 96.

(i) See *In the goods of Smith*, 16 W. R. 1130; *Miller v. James*, L. R. 3 P. & D. 4; *In re Trufort*, 36 Ch. D. 600; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

that duty they will be guided by the law of the domicile; and where there are no proceedings pending in the foreign Court under which the interests of the plaintiff can be equally protected the jurisdiction is not discretionary, but is a matter of course (*k*). The dictum of Lord Westbury in *Enohin v. Wylic* (*l*), that “the Court of the domicile is the *forum concursus* to which the legatees under the Will of a testator, or the parties entitled to the distribution of the assets of an intestate, are required to resort,” was dissented from by the majority of the Lords who decided that case, and has been expressly disapproved of in *Ewing v. Orr-Ewing* (*m*), and cannot be considered law.

Will of a person not a native, but domiciled here.

The rule above laid down (*n*) applies to the case of a person not a native of this country, but domiciled here at the time of his death: in this case, the law of England is to regulate the decision as to the validity of a Will of movable personal estate, or what are the rights under it (*o*).

Rules for ascertaining domicile.

The rules of law for ascertaining the domicile are considered in a subsequent part of this Work, conjointly with the rules of law as to the distribution of the effects of deceased persons who have died domiciled in a foreign country (*p*).

The above rules as to the validity of Wills in point of form were rendered to a great extent inapplicable to Wills made by British subjects dying after 6th August, 1861, by the statute 24 & 25 Vict. c. 114, known as Lord Kingsdown's Act.

As to Wills made by British subjects dying after Aug. 6, 1861.

By the first section of that Act, “every Will and other testamentary instrument (*q*) made out of the United Kingdom by a *British* subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death)

(*k*) *Enohin v. Wylic*, 10 H. of L., at p. 19, by Lord Cranworth; *Ewing v. Orr-Ewing*, 9 App. Cas. 34; S. C., 10 App. Cas. 453; *Abd-ul-Messih v. Farra*, 13 App. Cas. at pp. 437, 438; and see *Re Bonnefoi*, [1912] P. 233; but see *Deschamps v. Miller*, [1908] 1 Ch. 856.

(*l*) 10 H. of L., at p. 13.

(*m*) *Ewing v. Orr-Ewing*, 9 App. Cas. 34; 10 App. Cas. 453.

(*n*) *Ante*, p. 269.

(*o*) *Price v. Deuchurst*, 8 Sim. 279; S. C., 4 Mylne & Cr. 76, 82; *Yates v. Thompson*, 3 Cl. & Fin. 544. See *post*, Pt. III. Bk. III. Ch. II. § I., as to the construction of the Will of a testator domiciled abroad.

(*p*) *Post*, Pt. III. Bk. IV. Ch. I. § V. As to raising the question of domicile, see *Duprez v. Veret*, L. R. 1 P. & D. 583.

(*q*) In determining the question what papers are testamentary under the provisions of this statute, the Court will have regard to the law of one country only, and will not mix up the legal precepts of different countries: *Pechell v. Hilderley*, L. R. 1 P. & D. 673.

shall, as regards personal estate (*r*), be held to be well executed for the purpose of being admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin" (*s*).

Sect. 2.—"Every Will and other testamentary instrument made within the United Kingdom by any *British* subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate (*r*), be held to be well executed, and shall be admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made" (*t*).

Sect. 3.—"No Will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same" (*u*).

In *In the Estate of Groos* (*x*), it was held that this section is

Stat. 24 & 25
Vict. c. 114.

Wills made by British subjects out of the kingdom to be admitted if made according to the law of the place where made, or where testator was domiciled or had his domicile of origin.

S. 2. Wills made by British subjects in this kingdom to be admitted if made according to local law.

S. 3. Change of domicile not to invalidate Will or alter the construction.

(*r*) Leaseholds are personal estate within this section: *Re Grassi*, [1905] 1 Ch. 584; and so is an interest in the proceeds of sale of realty held upon trust for sale: *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80, C. A.

(*s*) As to the application of this section to a Will executed in France by a naturalised Englishman, see *In the goods of Lucroix*, 2 P. D. 94. A Will, however, of a foreigner executed abroad according to the formalities required by the English law is invalid, notwithstanding the provisions of this statute, and of the Naturalisation Act, 1870, that property may be disposed of by an alien in the same manner in all respects as by a natural-born British subject: *In the goods of Von Buseck*, 6 P. D. 211; *Bloxam v. Favre*, 8 P. D. 101; 9 P. D. 130. For a case in which no specific form was prescribed by the country in which the Will was executed, see *Stokes v. Stokes*, 78 L. T. 50; and see *Lyne v. De la Ferté*, 102 L. T. 143.

(*t*) A naturalised British subject whilst domiciled in England made a Will according to the forms required by the law of England. At the time of his death he was domiciled in Italy. His Will was admitted to probate under this section: *In the goods of Gally*, 1 P. D. 438.

(*u*) A domiciled Scotchman made a Will and afterwards married in Scotland. He subsequently acquired an English domicile, which he retained till his death. It was held that as the Will was valid as long as he remained in Scotland, it was not revoked by his subsequent change of domicile, and was entitled to probate in England: *In the goods of Reid*, L. R. 1 P. & D. 74.

(*x*) [1904] P. 269. In *In re Groos*, [1915] 1 Ch. 572, it was

not limited in its operation to the Wills of British subjects, but extends to the Will of a foreign testatrix made before her marriage, and in strict conformity with the law of her foreign domicile at that time, according to which marriage does not revoke a Will: and that the English domicile acquired by the testatrix after the date of her Will, and after the date of the marriage, did not affect the validity of the Will (y).

S. 4. Nothing in the Act to invalidate Wills otherwise made.

Sect. 4.—“Nothing in this Act contained shall invalidate any Will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such Will or other testamentary instrument may be revoked or altered by any subsequent Will or testamentary instrument made valid by this Act.”

S. 5. Extent of Act.

Sect. 5.—“This Act shall only extend to Wills and other testamentary instruments made by persons who die after the passing of this Act” (Aug. 6, 1861).

Will made under a power conformably to the terms of the power, but not conformably to the law of the place of domicile.

It must be here observed, that where a Will is made disposing of personal property situate in this country, under a power of appointment in an English Settlement, and it is duly executed in compliance with the requisites of the power, it has been held that such a Will ought to be admitted to probate in this country, notwithstanding it be not properly executed according to the forms prescribed by the testamentary law of the country in which the testator was domiciled at the time of his death (z), as

held that the area of the property over which the Will of the same testatrix took effect had been enlarged by her subsequent acquisition of an English domicile.

(y) See *Loustalan v. Loustalan*, [1900] P. 211; *Westerman v. Schwab*, 8 F. 132.

(z) *Tatnall v. Hankey*, 2 Moo. P. C. 342. The opinion to the contrary expressed by Sir C. Cresswell in *Crookenden v. Fuller*, 1 Sw. & Tr. 441, 454, was declared by that judge to be incorrect. See *In the goods of Alexander*, 29 L. J. P. M. & A. 93. But Lord Penzance, although he felt bound to follow the case of *In the goods of Alexander*, in the case of *In the goods of Hollyburton*, L. R. 1 P. & D. 90, feeling strongly, he said, the necessity of upholding a decision upon such a question until overruled by a Court of Appeal, as otherwise great injustice might be occasioned, expressed a strong opinion that *Crookenden v. Fuller* expressed a truer view of the law and was more in accordance with the judgment of the Privy Council in *Barnes v. Vincent*, 5 Moo. P. C. 201, which was subsequently to *Tatnall v. Hankey* (*ubi supra*), and, as he thought, inconsistent with the note to that case, the authority of which case he questioned. And in the case of *In the goods of Huber*, [1896] P. 209, Sir F. H. Jeune, though approving of the reasoning of Lord Penzance, followed the case of *In the goods of Alexander*, saying that inasmuch as Lord Penzance in 1866 refused to disturb the law as laid down in that case because Wills might have been made in reliance on that authority, *à fortiori*

it may nevertheless be a good execution of the power, which is a question to be decided by the Court of Construction (a), and a testamentary appointment will not be read or established in the Chancery Division unless it has been proved as a Will; and the probate is conclusive that the document is a valid Will (b).

A power to appoint "by Will," or "by a Will duly executed," and not requiring any special form of execution, is well executed by a Will good according to the law of the country of the testator's domicile, though ill executed according to the law of England (c). For the expression "Will" or "Will duly executed" in the instrument creating such a power must be taken to mean any instrument recognized by the law of England as a Will, and not as limited to a Will executed in accordance with the law of England; and this interpretation applies whether the power to appoint is general or special (d). Where, however, special formalities are required by the instrument creating the power, it is not enough that the instrument purporting to

must he pursue the same course in 1896. All doubt as to the authority of the rule was set at rest by the decision of the House of Lords in *Murphy v. Deichler*, [1909] A. C. 446. As to the form of the grant, see *In the goods of Tréfond*, [1899] P. 247; *In the goods of Vannini*, [1901] P. 330.

(a) *D'Huart v. Harkness*, 34 B. 324; *Pouey v. Hordern*, [1900] 1 Ch. 492; *Re Megret*, [1901] 1 Ch. 547; *In re Baker's Settlement Trusts*, [1908] W. N. 161.

(b) *D'Huart v. Harkness*, 34 B. 324; *Douglas v. Cooper*, 3 M. & K. 378; *Morgan v. Annis*, 3 De G. & Sm. 461; *Bradford v. Young*, 26 Ch. D. 656.

(c) *D'Huart v. Harkness*, 34 B. 324.

(d) *In re Price*, [1900] 1 Ch. 442, 447; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620, 626. The exercise of a special power of appointment is not a disposition of property belonging to the testator, and therefore the execution of a special power of appointment validly created and given to the testator by an English settlement, is in no way affected by any disability which he may be under to dispose of his own property by the law of his domicile: *Pouey v. Hordern*, [1900] 1 Ch. 492. As regards the exercise of a general power of appointment, a distinction has been drawn between cases in which the donee of the power has executed it in such a way as to make the property his assets for all purposes (see *In re Hadley*, [1909] 1 Ch. 20, 35), and cases in which the appointment is direct to the object of the appointor's bounty, and not such as to make the fund part of the appointor's own estate to be dealt with in one mass. In the former case, the testator has no greater power of disposition over the property which is the subject of the power of appointment than that which the law of his domicile allows him over his own property: *In re Pryce*, [1911] 2 Ch. 286; *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391. In the latter case, *semble*, the testator's exercise of the power of appointment is not subject to limitations imposed by the law of his domicile in testamentary dispositions: *In re Megret*, [1901] 1 Ch. 547; *In re Pryce*, [1911] 2 Ch. 286.

execute the power should be a Will valid according to the law of the appointor's domicile: for to such Wills sect. 10 of the Wills Act, 1837, does not apply, and although they are not invalidated by the prohibitory portion of that section, they do not derive validity from the enabling portion; in such cases, therefore, the Will must comply with the terms of the power (e). But defective execution in this respect may be remedied, according to the established rule in equity, for the persons and in the circumstances for whom and in which it is the practice of Courts of Equity to aid the defective execution of a power (f).

Application
of sect. 27 of
the Wills Act,
1837, to such
wills.

As regards the application of sect. 27 of the Wills Act, 1837, which provides that a general bequest or devise in a will shall be construed to include estates over which the testator had a general power of appointment, and shall operate as the execution of such a power, unless a contrary intention shall appear in the Will, it was held in *In re D'Este's Settlement Trusts* (g), that the general rule of construction introduced by that section does not apply to a foreign Will not executed in accordance with the provisions of the Wills Act, though valid according to the law of the testator's domicile and admitted to probate in this country, unless the Will contains on its face an indication that it is to be construed according to English rules of construction. The decision in this case, however, has been subjected to severe criticism by Neville, J., in the recent case of *In re Simpson* (h), in which the learned judge expressed the opinion that in considering the question of the execution of a power of appointment by Will made abroad but admitted to probate in England, the Court should have regard to the rule of construction contained in sect. 27 of the Wills Act, 1837, both in regard to the Wills of British subjects and of foreigners, and that a gift which according to the law of the domicile amounts to a general bequest of personal estate operates as an execution of a general power of appointment by Will unless a contrary intention appears (i). The opinion of the learned judge was adopted and applied in

(e) *Barretto v. Young*, [1900] 2 Ch. 339.

(f) *In re Walker*, [1908] 1 Ch. 560.

(g) [1903] 1 Ch. 898; followed in *In re Scholefield*, [1905] 2 Ch. 408. See *In re Price*, [1900] 1 Ch. 442.

(h) [1916] 1 Ch. 502.

(i) Sargant, J., expressed his agreement with this view in *In re Wilkinson's Settlement*, [1917] 1 Ch. 620, 627. And see *In re Baker's Settlement Trusts*, [1908] W. N. 161.

In re Lewal's Settlement Trusts (k), by Peterson, J., who refused to follow *In re D'Este's Settlement Trusts* (l).

It remains to consider the question whether a power to appoint "by will" or by "will duly executed" is validly exercised by a Will which is not well attested according to the law of the testator's domicile, nor attested by two witnesses as required by sects. 9 and 10 of the Wills Act, 1837, but is valid only by virtue of the provisions of Lord Kingsdown's Act (24 & 25 Vict. c. 114). On this point there is considerable conflict of authority. In *In re Kirwan's Trusts* (m), it was held by Kay, J., that a holograph codicil of a British subject made in France and unattested, which had been admitted to probate under Lord Kingsdown's Act, was invalid as a testamentary exercise of a power of appointment given by an English Will, on the ground that Lord Kingsdown's Act does not refer to sect. 10 of the Wills Act, 1837, and does not in any way touch or interfere with the negative provision of that section, namely, that no testamentary appointment can be made unless it is attested by two witnesses. In that case there was an additional and in itself a sufficient reason for the failure of the codicil as an exercise of the power, namely, that it did not comply with the special terms of the power, which was to appoint amongst children by deed or Will to be executed in the presence of one or more witnesses, and further, the learned judge was of opinion that the instrument was bad as a fraud on the power (n). In *Hummel v. Hummel* (o), the daughter of a testator had under his Will a general power of appointment by Will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being a

Execution of power by will valid only under Lord Kingsdown's Act.

(k) [1918] 2 Ch. 391.

(l) [1903] 1 Ch. 898.

(m) 25 Ch. D. 373.

(n) See Dicey, *Conflict of Laws*, 2nd edit., pp. 694, 824. There is a further point of difficulty in this case. In the course of his judgment (at p. 379), Kay, J., observed that the domicile of the testator at the time the codicil was made was in France. It appears from the report that the testator continued to reside in France until his death, from which arises an inference, not suggested to the learned judge, that he died domiciled in France. If that were the case, it appears, from the decision in *D'Huart v. Harkness*, 34 B. 324; 34 L. J. Ch. 311 (not referred to in *In re Kirwan's Trusts*), that sect. 10 of the Wills Act could have no application, and, further, the basis of the judgment, which proceeded on the footing that the codicil owed its validity wholly to Lord Kingsdown's Act, disappears.

(o) [1898] 1 Ch. 642.

valid Will according to French law. This writing was relied on as the execution of the power; it had not been admitted to probate, but Kekewich, J., answered the question whether, if it could be proved, it would be a good execution of the power, and he proceeded on the footing that it could only be proved under the provisions of Lord Kingsdown's Act (*o*). The learned judge, following *In re Kirwan's Trusts* (*p*), held that the writing, even if admissible to probate under sect. 1 of Lord Kingsdown's Act, did not operate as an execution of the general power of appointment, since it had not been attested by two or more witnesses as required by sects. 9 and 10 of the Wills Act, 1837.

These two decisions have been subjected to criticism both by judges and jurists (*q*). They were considered and commented upon in *In re Price* (*r*), by Stirling, J., who did not dissent from them, but considered them only applicable to Wills which owe their validity to Lord Kingsdown's Act. In *In re Simpson* (*s*), Neville, J., expressed the view that the decision in *In re Kirwan's Trusts* (*p*) was directly contrary to *D'Huart v. Harkness* (*t*), and that the suggested distinction that the former decision dealt with Wills only valid under Lord Kingsdown's Act would have the result of depriving a British subject of a right he had previously possessed independently of that Act, notwithstanding that sect. 4 of the Act expressly preserves the validity of testamentary instruments which would have been valid if the Act had not passed. In *In re Wilkinson's Settlement* (*u*), Sargant, J., said that the authority of *In re Kirwan's Trusts* (*p*), and *Hummel v. Hummel* (*v*), had been seriously weakened by the decision in *In re Price* (*r*), and that the cases must at least be taken as limited in their operation to cases where the Will purporting to exercise the power could only be admitted to English probate under the provisions of Lord Kingsdown's Act.

(*o*) It appears from the report that the testator married an Austrian subject, and it is difficult to understand how the provisions of sects. 1 or 2 of Lord Kingsdown's Act, which apply only to British subjects, could have had any application.

(*p*) 25 Ch. D. 373.

(*q*) Professor Dicey (see his *Conflict of Laws*, 2nd edit., p. 821 *et seq.*) advances weighty reasons for saying that they should not be followed.

(*r*) [1900] 1 Ch. 442; see also *In re Walker*, [1908] 1 Ch. 560.

(*s*) [1916] 1 Ch. 502.

(*t*) 34 B. 324; 34 L. J. Ch. 311.

(*u*) [1917] 1 Ch. 620.

(*v*) [1898] 1 Ch. 642.

It has been held that the combined effect of sects. 11 and 27 of the Wills Act, 1837, is to preserve to infant soldiers in actual military service the power which they previously possessed of exercising a general power of appointment over personal estate by Will (x).

Exercise of power by infant soldiers.

SECTION VII.

Practice of the Probate Division in regard to Costs and in relation to other matters respecting Grant of Probate.

Costs in the Probate Division are now governed, as in the other Divisions of the High Court, by the Judicature Acts and the Rules of the Supreme Court made thereunder, but, inasmuch as by those Acts and Rules costs are, speaking generally, in the discretion of the Court, the result is that the rules as to costs, which formerly obtained in the Court of Probate, are still observed in the Probate Division, and that portion of this Treatise which deals with such rules is therefore preserved, subject to such modifications as may have been introduced by recent decisions, or rules.

Costs in the Probate Division :

Ord. LXV. r. 1 of the Rules of the Supreme Court, 1883, provided that "Subject to the provisions of the Acts and these rules the costs of and incident to all proceedings in the High Court shall be *in the discretion of the Court or judge*: but nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceeding, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter or issue is tried by a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

now governed by R. S. C. 1883, Ord. LXV. r. 1. Judicature Act, 1890, ss. 4 and 5.

It was decided in the case of *Re Mills' Estate* (y) that the Judicature Acts and Rules of the Supreme Court, 1883, Ord. LXV. r. 1, did not enable the Court or a judge to order costs to be paid by persons who before the Acts came into operation could not have been ordered to pay them: the effect and intention of the Acts and Orders being not to give any new

(x) *In re Wernher*, [1918] 2 Ch. 82; and see the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58), s. 1.

(y) 34 Ch. Div. 24.

jurisdiction to award costs, but only to regulate the mode in which costs were to be dealt with where the Court antecedently had jurisdiction either originally or by statute to award costs. This rule adopted the practice of the Court of Chancery, where, speaking generally, costs were in the discretion of the Court; and applied it to the Common Law Division as well (*n*). But now it is enacted by section 5 of the Judicature Act, 1890, that "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid"—thus doing away with the effect of the above-mentioned decision in *Re Mills' Estate*, and giving to the Court a new jurisdiction (*o*).

The question of costs was in the discretion of the judge under the practice both of the Court of Probate and of the Prerogative Court, its predecessor (*p*).

It was only under special circumstances that the Ecclesiastical Court directed costs to be paid out of the estate of the deceased (*q*). It did not follow that a party was entitled to

In what case costs decreed out of the estate of the deceased.

(*n*) *Foster v. Great Western Rail. Co.*, 8 Q. B. p. 520.

(*o*) *Re Fisher*, [1894] 1 Ch. 450; *Re Wrexham, &c. Rail. Co.*, [1900] 1 Ch. 261; *Re Schmarr*, [1902] 1 Ch. 326; *The Rosalia*, [1912] P. 109; *Dartford Brewery Co. v. Moseley*, [1906] 1 K. B. 462. By sect. 4 of the Judicature Act, 1890, it is enacted that "Nothing in this Act shall alter the practice in any criminal cause or matter, or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division." See *London County Council v. Overseers of West Ham*, [1892] 2 Q. B. 104. See also *ante*, p. 243.

(*p*) See *ante*, p. 231, and Rules 4, 5, and 6 in the Court of Probate, 1864 (Contentious Business).

(*q*) *Dean v. Russel*, 3 Phillim. 334. The Court had, prior to the passing of the Land Transfer Act, 1897, no jurisdiction to order costs to be paid out of the real estate: *Young v. Dendy*, L. R. 1 P. & D. 344; *Davies v. Reynolds*, L. R. 3 P. & D. 90; *Re Shaw*, [1894] 3 Ch. at p. 620. Except, it seems, by consent of the parties interested, in cases where the personal estate is insufficient: *Smith v. Hopkinson*, 4 P. D. 84. But now, by R. S. C. Ord. LXV. r. 14D, in any probate action in which it is ordered that any costs should be paid out of the estate, the judge making such order may direct out of what portion of the estate such costs shall be paid. Orders for payment of costs out of the real estate under this rule were made in *Dean v. Bulmer*, [1905] P. 1; *Re Vickerstaff*, [1906] 1 Ch. 762; and out of the legacies of certain legatees in *Harrington v. Butt*, [1905] P. 3, n.; *Child v. Osment*, [1914] P. 129. In *Haydon v. Pring*, [1919] P. 131, C. A., it was held that an order that the costs of one of two co-plaintiffs (being

his costs out of the estate, because there was "*justa causa litigandi*" (*r*): but the principle which guided the Court in decreeing such costs was, that the party was led into the contest by the state in which the deceased left his papers (*s*), or that the validity of the Will has been contested on a doubtful point of law (*t*).

Two rules were laid down by Sir J. P. Wilde for the guidance of the Court of Probate (*u*):—First, if the cause of litigation takes its origin in the fault of the testator (*w*), or *those interested in the residue* (*x*), the costs may be properly paid out of

executors unsuccessfully propounding a Will) should be paid out of the testatrix's estate, and that the other co-plaintiff should pay to the defendant the costs of the action, including the costs ordered to be paid to his co-plaintiff out of the testatrix's estate, was wrong, and ought not to have been made, and that as the co-plaintiffs had failed in their action the proper order was to dismiss it with costs.

(*r*) *Barwick v. Mullings*, 2 Hagg. 234. In *Nicholls v. Binns*, 1 Sw. & Tr. 239, 241, Sir C. Cresswell said that by the practice of the Ecclesiastical Courts, where there was a fair case for inquiry, the next of kin might call on the executors to prove the Will in solemn form, and *generally speaking, at the expense of the estate*. But the same judge refused to allow the next of kin their costs out of the estate, when they had chosen to raise a question of domicile, which was likely to put the executors to great expense: *Onslow v. Cannon*, 2 Sw. & Tr. 136. See also *Seaton v. Sturch*, 29 L. J. P. & M. 195.

(*s*) *Hillam v. Walker*, 1 Hagg. 75.

(*t*) *Robins v. Dolphin*, 1 Sw. & Tr. 518. And the general proposition, that where a party entitled in distribution simply calls for proof of a Will, and merely cross-examines the witnesses, without any misconduct in the suit, he is entitled to have his costs out of the estate, is fully supported by the authorities: *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232. But it is otherwise where the proceedings were not taken simply for the purpose of getting the opinion of the Court on the Will, but were ancillary to another suit pending in respect of the real estate: *Swinfen v. Swinfen*, 1 Sw. & Tr. 283. For instances where the unsuccessful party has not been condemned in costs, see *Ferrey v. King*, 3 Sw. & Tr. 51; *Bramley v. Bramley*, *ib.* 430; *Tippett v. Tippett*, L. R. 1 P. & D. 54. See further as to costs, *Cleare v. Cleare*, L. R. 1 P. & D. 655; and *ante*, p. 241 *et seq.*

(*u*) *Mitchell v. Gard*, 3 Sw. & Tr. 275; and see these rules restated and re-affirmed: *Twist v. Tye*, [1902] P. 92; *Spiers v. English*, [1907] P. 122.

(*w*) See accord. *Boughton v. Knight*, L. R. 3 P. & D. 64; *Charter v. Charter*, L. R. 7 H. L. 364; *Jenner v. Ffinch*, 5 P. D. 106; *Hillam v. Walker*, 1 Hagg. at p. 75; *Thorncroft v. Lashmer*, 2 Sw. & Tr. at p. 484; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Davies v. Gregory*, L. R. 3 P. & D. at p. 31; *Roe v. Nix*, [1893] P. 55; *Cousins v. Tubb*, 65 L. T. 716; *Williams v. Coker*, 67 L. T. 626; *Shortman v. Shortman*, 67 L. T. 717.

(*x*) See accord. *Williams v. Henery*, 3 Sw. & Tr. 471; *Smith v. Smith*, 4 Sw. & Tr. 3; *Goodacre v. Smith*, L. R. 1 P. & D. 359; *Orton v. Smith*, L. R. 3 P. & D. 23; *Wilson v. Basil*, [1903] P. 239; but see *Spiers v. English*, [1907] P. 122; *Lery v. Leo*, 25 T. L. R. 717; *Oldcorn v. Tenniswood*, 25 T. L. R. 825; *Browning v. Mostyn*,

the estate; secondly, if there be a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the Will or the capacity of the testator (*y*), or to put forward a charge of undue influence or fraud (*z*), the losing party may properly be relieved from the costs of his successful opponent (*a*).

Unless the circumstances are such as to bring the case within one of the foregoing rules, the Court will not interfere with the general rule that costs should follow the event (*b*).

Cases in which executor propounding a Will will be condemned in costs.

Although, generally speaking, an executor propounding a Will will be entitled to his costs, yet if it appears that an executor, when propounding the will, must have known that he was attempting to obtain the sanction of the Court to a document which cannot be supported, he will be condemned in costs (*c*). Thus an executor was condemned in costs, where without explanation he consented to a verdict against him on the morning of the trial (*d*): where it appeared that he knew that the Will had not been well executed (*e*), and where there

66 L. J. P. & M. 37; *Speke v. Deakin*, 109 L. T. 719; *Child v. Osment*, [1914] P. 129.

(*y*) *Frere v. Peacock*, 1 Rob. 456; *Waring v. Waring*, 5 Notes of Cas. 324; *Bramley v. Bramley*, 3 Sw. & Tr. 430; *Tippett v. Tippett*, L. R. 1 P. & D. 54; *Aylwin v. Aylwin*, [1902] P. 203.

(*z*) *Bramley v. Bramley*, 3 Sw. & Tr. 430; *Summerell v. Clements*, 3 Sw. & Tr. 35; *Smith v. Smith*, L. R. 1 P. & D. 239; *Orton v. Smith*, L. R. 3 P. & D. 23; *Spiers v. English*, [1907] P. 122; and see the cases cited *supra*, p. 285, note (*x*).

(*a*) See accord. *Davies v. Gregory*, L. R. 3 P. & D. 28; *Orton v. Smith*, *ib.* 23; *Roe v. Nix*, [1893] P. 55. See further *Nash v. Yelloly*, 3 Sw. & Tr. 59, where a plaintiff who was the executor was condemned in costs, the Will having been refused probate on the ground of undue influence. But in cases where neither the testator by his own conduct, nor the executors or persons interested under the Will by their conduct, have brought about the litigation as to its validity, but the opponents of the Will, after due inquiry into the facts, entertained a *bonâ fide* belief in the existence of a state of things which, if it did exist, would justify litigation, and the opposition is unsuccessful, each party must pay his own costs: *Davies v. Gregory*, *ubi supra*.

(*b*) *Twist v. Tye*, [1902] P. at p. 93; *Spiers v. English*, [1907] P. at p. 123; *Page v. Williamson*, 87 L. T. at p. 147.

(*c*) *Boughton v. Knight*, L. R. 3 P. & D. at p. 77; *Page v. Williamson*, 87 L. T. 146. And see *Smith v. Atkins*, L. R. 2 P. & D. 169; *Cottrell v. Cottrell*, L. R. 2 P. & D. 397; *Rogers v. Lecocq*, 65 L. J. P. & M. 68; *Twist v. Tye*, [1902] P. 92; *Hill v. Jeffries*, 33 T. L. R. 80; *Haydon v. Pring*, [1919] P. 131, C. A.

(*d*) *Richards v. Humphreys*, 29 L. J. P. & M. 137.

(*e*) *Clarkson v. Waterhouse*, 29 L. J. P. & M. 136.

was an inofficious instrument propounded by a person materially benefited (*f*).

Where an executrix through her negligence lost a Will, and proved a draft of it, she was ordered to pay the costs of the defendants, and was allowed out of the estate such costs only as she would have been entitled to if she had proved the original Will in solemn form (*g*).

The mere fact that a person who has improperly propounded a testamentary paper is a nude executor, is no ground for relieving him from his liability to condemnation in costs (*h*).

A legatee, performing the duty of an executor in proving the Will or codicil, is entitled to his costs out of the estate (*i*). But the rule as to a legatee having his costs out of the estate on establishing a codicil, is not so general as in the case of a Will (*k*): And if they are occasioned by his own delay in producing the paper, he must pay his own costs (*l*).

Legatee proving Will entitled to costs out of the estate.

Where a party propounding a Will became a bankrupt, the Court directed him to find security for costs (*m*).

Security for costs.

The rule of the Common Law Courts as to the occasions on which security for costs should be given, was adopted by the

(*f*) *Dodge v. Meech*, 1 Hagg. 612; *Smith v. Atkins*, L. R. 3 P. & D. 169.

(*g*) *Burls v. Burls*, L. R. 1 P. & D. 472.

(*h*) *Rennie v. Massie*, L. R. 1 P. & D. 118.

(*i*) *Williams v. Goude*, 1 Hagg. 610; *Sutton v. Drax*, 2 Phillim. 323. And just as an executor who proves a Will is entitled to take the costs, which he has incurred, out of the estate without any order of the Court, so a legatee, performing the duty of an executor, will be entitled to an order that his extra costs shall be paid out of the estate. See *Wilkinson v. Corfield*, 6 P. D. 27. The order will be *nomine expensarum*: *Bremer v. Freeman*, Dea. & Sw. 258. See also *Brewsher v. Williams*, 3 Sw. & Tr. 62. So a next of kin who had successfully opposed a Will propounded by the widow of the deceased as sole executrix named therein, the widow not being condemned in costs, was held to be entitled to costs out of the estate: *Critchell v. Critchell*, 3 Sw. & Tr. 41. *Secus*, if the unsuccessful litigant has been condemned in costs: *Nash v. Yelloly*, 3 Sw. & Tr. 59; but see *Cross v. Cross*, 3 Sw. & Tr. at p. 300; and see *Dyke v. Williams*, L. R. 2 P. & D. 239. If the next of kin obtains a grant, he can recoup himself out of the estate in either case: Mortimer on Probate, p. 695.

(*k*) *Headington v. Holloway*, 3 Hagg. 280, 283. In *Speke v. Deakin*, 109 L. T. 719, where the executors of a Will refused to prove a codicil, produced two years after the Will and two other codicils had been proved, and pleaded against it when propounded, on the codicil being established, the executors were condemned in the costs of the legatees propounding the codicil.

(*l*) *Headington v. Holloway*, *ubi sup.*

(*m*) *Goldie v. Murray*, 2 Curt. 797; *Lambert v. Bessett*, 11 Ir. R. Eq. 291, a case of a defendant a *caveator* and uncertificated bankrupt.

Court of Probate, *e.g.*, security for costs was required of a plaintiff to a suit when resident without the jurisdiction of the Court, but was not required of a person who was the defendant or in a similar position (*n*). It should be observed, that on the question as to the immunity of the defendant from giving security for costs, the substantial, and not only the nominal, position of defendant and plaintiff respectively in the suit should be considered, as in certain cases, in the Probate Division, the nominal position of plaintiff or defendant depends on the mode in which the cause commenced (*o*).

Amount of security.

This question of giving security for costs in the Probate Division was governed by the old common law rule, which required substantial security according to the nature of the case and given from time to time (*p*). And now, in all the Divisions of the High Court under R. S. C. 1883, Order LXV., rule 6, in any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the Court or a judge shall direct.

R. S. C. 1883, Ord. LXV. r. 6.

Liability of married women to give security for costs.

Married women suing as plaintiffs without their husbands being joined are not, since the Married Women's Property Act, 1882, liable to give security for costs (*q*).

Costs in case of a party opposing Will after giving notice under R. S. C. Ord. XXI. r. 18.

The position of a party opposing a Will, and giving notice under R. S. C. Order XXI., rule 18, with regard to his liability to pay costs under the practice of the Prerogative Court, the Court of Probate, and the Probate Division of the High Court, respectively, has already been dealt with (*r*).

Costs of interveners.

There is no definite rule as to the payment of the costs by or to interveners. Each particular case depends on its own circumstances. It is not, however, the practice of the Court to allow more than one set of costs, unless there is sufficient divergence

(*n*) *Robson v. Robson*, 3 Sw. & Tr. 568.

(*o*) *Robson v. Robson*, 3 Sw. & Tr. 568. And see *Crispin v. Doglione*, 1 Sw. & Tr. 522. Cf. *Belmonte v. Aymard*, 4 C. P. D. 352; *Tomlinson v. Land Finance Corporation*, 14 Q. B. D. 539. But see *In the goods of Twomey*, [1900] Ir. R. 2.

(*p*) *Republic of Costa Rica v. Erlanger*, L. R. 3 C. D. 62.

(*q*) *Threlfall v. Wilson*, 8 P. D. 18. As to the liability of a married woman who has general separate estate to condemnation in costs, see *Morris v. Freeman*, 3 P. D. 65; and as to costs out of property subject to a restraint on anticipation: *Moran v. Place*, [1896] P. 214; *Crickitt v. Crickitt*, [1902] P. 177; Married Women's Property Act, 1893, s. 2.

(*r*) *Ante*, p. 241.

of interest between the persons claiming their costs out of the estate to justify their being separately represented (*s*).

By the practice of the Prerogative Court, as it has been already pointed out (*t*), the next of kin, a creditor who had obtained a grant of administration, or an executor under a former Will, had a right to call upon the executor to prove the Will in solemn form, without being liable for costs, provided that they did not do so vexatiously. If they exercised this right vexatiously, or pleaded, or attempted to set up, a case of fraud, which they were not justified by the evidence in doing, they were liable to be ordered to pay costs. This right, however, does not extend to a residuary legatee under a former Will.

Costs of party calling on executor to prove a Will.

If they put an executor on proof after he had taken probate in common form, they did so at the risk of being condemned in costs.

In a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit (*u*).

What costs are included.

The Court of Chancery had and the High Court of Justice now has, in matters of equitable jurisdiction an inherent general discretionary power to award costs as between solicitor and client to a successful party as and when the justice of the case might so require (*w*). The Courts of Common Law, however, had no power to give costs as between solicitor and client (*x*), nor had the Ecclesiastical Courts power to give costs as between proctor and client (*y*). In the case of *Andrews v. Barnes* (*w*), the Court would not express any opinion, as the question did not arise, whether the High Court had such jurisdiction given to it in common law matters by the Judicature Act. It would seem,

Costs as between solicitor and client.

(*s*) See *Tennant v. Cross*, 12 P. D. 4; *Bagshaw v. Pimm*, [1900] P. 148; *Twist v. Tye*, [1902] P. at p. 98. For instances in which the interveners have been allowed costs out of the estate, see *Cross v. Cross*, 3 Sw. & Tr. 300; *Jenner v. Ffinch*, 5 P. D. 106; *Burgoyne v. Showler*, 1 Rob. at p. 13; but see *contra Colvin v. Fraser*, 2 Hagg. 368; *Shaw v. Marshall*, 1 Sw. & Tr. 129. Before the Land Transfer Act, 1897, an heir-at-law who intervened in a suit, not being cited, and opposed a Will, was entitled to costs, if the Will was pronounced against: *Rayson v. Parton*, L. R. 2 P. & D. 38. And where he was made a party by order of the Court, even though he was ultimately unsuccessful: *Singleton v. Tomlinson*, 3 App. Cas. 404. Since the Act, however, the reason for preferential treatment of the heir-at-law has disappeared, and his right to costs is on the same footing as those of other interveners: *Twist v. Tye*, [1902] P. at p. 98.

(*t*) *Ante*, pp. 240, 241.

(*u*) *Fisher v. Fisher*, 4 P. D. 231; *Taylor v. Taylor*, 6 P. D. 29.

(*w*) *Andrews v. Barnes*, 39 C. D. 133.

(*x*) *Mordue v. Palmer*, L. R. 6 Ch. 22, 32.

(*y*) *Peddle v. Evans*, 1 Hagg. 684; *Peddle v. Toller*, 3 Hagg. 387.

however, that now under section 5 of the Judicature Act, 1890, the High Court has power to award costs as between solicitor and client in matters of common law jurisdiction except so far as excepted by section 4 of that Act (z).

Liability of party cited but who has not appeared to pay costs.

The Court, in a case where a defendant had destroyed the Will the subject of proof, held that it had power to condemn the party who had been cited, but had not appeared, in the costs of the suit (a); so too a person who has not been cited, nor made himself a party to the suit, but who has entered a *caveat*, may be condemned in costs (b).

Probate of a Will may be in part granted and in part refused :

It is a necessary consequence of some of those rules of the Court of Probate, which there has already been occasion to notice (c), that a Will may be in part admitted to probate, and in part may be refused. Thus, if the Court shall be satisfied that a particular clause has been inserted in a Will, by fraud, without the knowledge of the testator in his lifetime (d), or by forgery after his death (e), or, it would seem, if he has been induced by fraud to make it a part of his Will (f), probate will be granted of the instrument with the reservation of that clause (g). Again, where a clause is introduced in a testamentary paper, *per incuriam*, and the deceased executes the paper, not having given any instructions for such clause, and it not having been read over to him, probate will be granted of the remainder of the paper, omitting such clause (h). So, before the Wills Act, since part of a Will may be established, and part held not entitled to probate, if actual incapacity were shown at the time of the execution of the latter part, the Will would, in such case, be engrossed without it (i). But the Court cannot, even by consent, order a passage of the Will to be expunged, which

but the Court cannot expunge.

(z) Sect. 4 enacts: "Nothing in this Act shall alter the practice in any criminal cause or matter, or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division."

(a) *King v. Gillard*, L. R. 1 P. & D. 539.

(b) *Ratcliffe v. Barnes*, 31 L. J. P. & M. 61.

(c) *Ante*, p. 253 *et seq.*

(d) *Barton v. Robins*, 3 Phillim. 455, note (b).

(e) *Plume v. Beale*, 1 P. Wms. 388.

(f) *Allen v. McPherson*, 1 H. of L. 191.

(g) Even, it seems, where the rejection of the words renders the context ambiguous or meaningless: see *In the goods of Boehm*, [1891] P. at p. 251; but see *Rhodes v. Rhodes*, L. R. 7 A. C. at p. 193.

(h) *Ante*, p. 253, note (z).

(i) *Billinghurst v. Vickers*, 1 Phillim. 187; *Wood v. Wood*, *ib.* 357; see *ante*, p. 28.

the testator, being of sound mind, intended to form part of it (*k*). But though the Court cannot expunge any words from the original Will, it has, it seems, allowed offensive passages, such as scurrilous imputations on the character of another man, to be excluded from the probate and from the copy kept in the Registry (*l*). And, in a recent case (*m*), where it appeared that the military authorities thought it undesirable that portions of a letter which included a soldier's Will should be published, the Court directed that these passages should be excluded from the probate.

In a case where the executor and universal legatee had been, by a mistake of the solicitor who drew the Will, described therein by a wrong name; (viz., "my nephew Barton Nicholas *Shuttleworth*" instead of "Barton Nicholas *Bayley*") probate was granted to him in his right name, the testator's next of kin consenting (*n*). And where the christian names of an executor called in a Will and grant of probate "Frederick" were "Frederick John" the Court, to satisfy an objection taken by

Probate granted in his right name to an executor wrongly named in the Will:

(*k*) So, where a legatee, at the request of the testator, signed her name to the Will, and the testator subsequently duly executed the Will in the presence of two witnesses, who attested it, a motion to strike out the name of the legatee was rejected: *In the goods of Mitchell*, 2 Curt. 916; *In the goods of Forest*, 2 Sw. & Tr. 334; *In the goods of Raine*, 34 L. J. P. & M. 125; *In the goods of Smith*, 3 Sw. & Tr. 589. But in *In the goods of Sharman*, L. R. 1 P. & D. 661, where a Will had been executed in the presence of two witnesses, and in addition to their signatures the signature of a third person, who was also residuary legatee, appeared at the foot of the Will, the Court received evidence to explain why such signature was written, and, being satisfied that it was not written with the intention of attesting the signature of the testator, ordered it to be omitted in the probate. This decision does not seem quite consistent with the earlier cases, and particularly not with *In the goods of Forest*, *ubi supra*, in which case Sir C. Cresswell pointed out that if the signature were omitted in the probate the next of kin would be unable in a Court of Construction to raise the question as to whether the signature was that of a subscribing witness so that persons signing would forfeit all interest under the Will, whereas if the signature were retained it might still be shown that the signature was not that of a subscribing witness. The case of *In the goods of Sharman* (*ubi sup.*) was, however, followed in the case of *In the goods of Smith*, 15 P. D. 2.

(*l*) *Curtis v. Curtis*, 3 Add. 33. The words sought to be expunged in that case were in the Will of a husband reflecting severely on the conduct of his wife. *In the goods of Wartnaby*, 1 Robert. 423; *Marsh v. Marsh*, 1 Sw. & Tr. 528; *In the goods of Honywood*, L. R. 2 P. & D. 251; *In the estate of White*, [1914] P. 153.

(*m*) *In the estate of Heywood*, [1915] P. 47.

(*n*) *In the goods of Shuttleworth*, 1 Curt. 911. And see *In the goods of Chappell*, W. N. (1894) 16; *In the goods of Cooper*, [1899] P. 193.

but *the Will*
cannot be
altered:

nor cancelled
in part.

Probate of a
lost Will:

the Bank of England to transferring stock, allowed the description in the grants to be altered into "Frederick John M. called in the Will Frederick M." (*o*). But the Court cannot, even by consent, alter the Will by substituting one name for another, however cogent the evidence of mistake may be (*p*).

Nor has the Court, under any circumstances, power to make any alteration in papers of which probate has been granted. Therefore, where the Vice-Chancellor of England had ordered that two promissory notes, which, with certain testamentary indorsements on them, had been admitted to probate, should be paid in a certain way, and that having been done, he further ordered that the notes should be cancelled, Sir H. Jenner Fust refused to direct that this order should be carried into effect (*q*).

It is laid down by Swinburne, that if a testament be made in writing, and afterwards lost by some casualty, if there be two unexceptionable witnesses who did see and read the testament written, and do remember the contents thereof, these two witnesses, so deposing to the tenor of the Will, are sufficient for the proof thereof in form of law (*r*). In such cases the Court will grant probate of the Will "as contained in the depositions of the witnesses" or "in a copy," or as the case may be (*s*): And, at this day, it is quite clear that the contents or substance of a testamentary instrument may be thus established, though the instrument itself cannot be produced, upon satisfactory proof being given that the instrument was duly made by the testator, and was not revoked by him (*t*). Thus, where the

(*o*) *In the goods of Honeywood*, [1895] P. 341; *In the goods of Baskett*, 78 L. T. 843.

(*p*) *In the goods of Collins*, 7 Notes of Cas. 278; *In the goods of Boehm*, [1891] P. 247. See *ante*, p. 256.

(*q*) *In the goods of Hughes*, 2 Robert. 341.

(*r*) Swinb. Pt. 6, s. 14, pl. 4.

(*s*) *Trevelyan v. Trevelyan*, 1 Phillim. 154. Where a Will has been lost and evidence of its contents is supplied by the production of a draft and of the parol testimony of persons who had read the Will, the parol evidence must be placed side by side with the draft, and out of them the Court will extract the contents of the Will to be proved: *Burls v. Burls*, L. R. 1 P. & D. 472.

(*t*) The contents of a lost Will, like those of any other lost instrument, may be proved by secondary evidence. As to the admissibility of declarations, written or oral, made by a testator *before* and *after* the execution of his Will, see *ante*, p. 259. The contents of a lost Will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached: *Sugden v. Lord St. Leonards*, 1 P. D. 154. See also the case of *Harris v. Knight*, 15 P. D. 170, where the existence and contents of a lost Will and the

testator had delivered his Will to A. to keep for him, and four years afterwards died, when the Will was found gnawn to pieces by rats, and in part illegible; on proof of the substance of the Will, by the joining of the pieces, and the memory of witnesses, probate was granted (*u*). So if a Will, duly executed, is destroyed in the lifetime of the testator, without his knowledge, it may be pronounced for, upon satisfactory proof being given of its having been so destroyed, and also of its contents (*w*). And where, after the death of the testator, his Will and codicil were wrongfully torn by his eldest son, the Court, having by means of some pieces which were saved, and by oral evidence, arrived at the substance of the instruments, pronounced for them (*x*). But when allegations of this sort are made, they must be supported by the clearest and most stringent evidence (*y*). In accordance with these decisions, it was held by the Court of Queen's Bench, in *Brown v. Brown* (*z*), that parol evidence was sufficient to prove the contents of a Will and thereby establish it, so as to revoke a Will of earlier date. And Lord Campbell laid it down generally that parol evidence of the contents of a lost instrument may be received as much when it is a Will as if it were any other. And this case was acted on on several occasions by Sir

or of a Will cancelled or destroyed by fraud, or become illegible.

Parolevidence to prove contents of a Will.

handwriting of testator and attesting witnesses who had died some time after the testator were proved by parol evidence. The circumstances of this case were very peculiar, and Cotton, L. J., dissented from the judgment of the rest of the Court. And see *In the estate of Spain*, 31 T. L. R. 435; *In the estate of Phibbs*, [1917] P. 93.

(*u*) Toller, 70. And see *In the goods of Wright*, 44 Ir. L. T. 137; and for the practice as to the form of probate, *Gill v. Gill*, [1909] P. 157. As a general rule, the Court requires the draft or copy of a lost or destroyed Will to be propounded before admitting it to probate; and will not allow the Will to be proved on motion unless all persons adversely affected are of full age and consent: *In the goods of Barber*, L. R. 1 P. & D. 267; *In the goods of Pearson*, [1896] P. 289; *In the estate of Carter*, 52 Sol. J. 600; except in special circumstances, see *In the estate of Apter*, [1899] P. 272; *In the estate of Brassington*, [1902] P. 1.

(*w*) *Trevelyan v. Trevelyan*, 1 Phillim. 149; see also *Parker v. Hickmott*, 1 Hagg. 211, as to granting probate, in its original state, of a Will altered without the testator's concurrence. See also *In the goods of Cooke*, 3 Curt. 737.

(*x*) *Foster v. Foster*, 1 Add. 462; *Knight v. Cook*, 1 Cas. temp. Lee, 413; *In the goods of Leigh*, [1892] P. 82; *Lafone v. Griffen*, 25 T. L. R. 308. See also *Martin v. Laking*, 1 Hagg. 244, where the widow, after the testator's death, caused his Will to be destroyed, and probate of the draft of such Will was granted.

(*y*) *Huble v. Clark*, 1 Hagg. 115; *Wharram v. Wharram*, 3 Sw. & Tr. 301, 307; *Moore v. Whitehouse*, 3 Sw. & Tr. 567.

(*z*) 8 E. & B. 876.

C. Cresswell (*a*). But in *Wharram v. Wharram* (*b*), Sir J. P. Wilde appeared to doubt the soundness of the doctrine in *Brown v. Brown*, by reason of the provision in the 10th section of the Wills Act that “no Will shall be valid,” “unless it be in writing, &c.” And the learned judge seemed to think that the current of authorities had somewhat hastily flowed on past the period of the Wills Act, without any notice of that enactment. But with the greatest deference it may be observed that it is somewhat difficult to see how that enactment affects the question; and the learned judge himself on a subsequent occasion, where a case of suppression, or if not of destruction of the Will was made out, granted administration with the Will annexed to the residuary legatee (*c*). So where a codicil had been burnt by the testator’s order, but not in his presence, as required by the statute, Sir J. Dodson decreed probate of a draft copy (*d*). And it should seem, that unless in cases of this kind secondary evidence of the Will were allowed to be sufficient, much injustice and impunity for fraud would be permitted. The case of *Wharram v. Wharram* (*e*) was considered, and the previous cases reviewed by the Court of Appeal in *Sugden v. Lord St. Leonards* (*f*), when it was held that the contents of a lost Will, like those of any other lost instrument, may be proved by secondary evidence, and that where the contents of the Will are not completely proved, probate may be granted to the extent to which they are established. If a Will be wholly or partially cancelled, or destroyed, by the testator whilst of unsound mind, probate will be granted of it as it existed in its integral state, that being ascertainable (*g*).

Probate of
Will can-
celled by
testator while
non compos.

Double pro-
bate where

Probate granted to one of several executors, enures to the

(*a*) *In the goods of Gardner*, 1 Sw. & Tr. 109, where the Will had been left, during the mutiny, in India, and probate was granted of the Will as contained in the affidavits. See also *In the goods of Brown*, 1 Sw. & Tr. 32, where the facts were the same as those in *Brown v. Brown*; *Wood v. Wood*, L. R. 1 P. & D. 309.

(*b*) 3 Sw. & Tr. 301, which case now seems to be overruled. See per Jessel, M. R., in *Sugden v. Lord St. Leonards*, 1 P. D. 154, at p. 239.

(*c*) *Podmore v. Whatton*, 3 Sw. & Tr. 449.

(*d*) *In the goods of Dadds*, Dea. & Sw. 290.

(*e*) 3 Sw. & Tr. 301.

(*f*) 1 P. D. 154. See *ante*, p. 292, n. (*t*). See also *Woodward v. Gouldstone*, 11 App. Cas. 469.

(*g*) *Scruby v. Fordham*, 1 Add. 74; *In the goods of Crandon*, 84 L. T. 330.

benefit of all (*h*). Where there are several executors, upon the grant of probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the probate already granted enures to their benefit and because they have a right to the grant, whether the power be reserved or not. The practice is to take out what is called a double probate; which is in this manner: The first executor that comes in takes probate in the usual form, with reservation to the rest: Afterwards, if another comes in, he also is to be sworn in the usual manner, and an engrossment of the original Will is to be annexed to such probate in the same manner as the first; and in the second grant such first grant is to be recited: And so on, if there are more that come in afterwards (*i*).

there are several executors.

What is "double probate."

If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one Will to be proved, one proving of it suffices (*k*). So if B. is made executor for ten years, and afterwards C. is to be executor, and B. proves the Will, and the ten years expire, C. may administer without any further probate (*l*). It is, however, the practice in such a case to require the substituted executor to take a second or "cessate" grant of probate, and so in every case where the original grant has been limited for any specified time or until the happening of any specified event or contingency (*m*).

Probate where there are several executors with distinct powers: or for distinct portions of time.

The Court may grant a limited probate where the testator has limited the executor (*n*). And it is laid down (*o*) that if a man makes and appoints an executor for one particular thing only, as touching such a statute or bond and no more, and makes no other executor, he dies intestate as to the residue of his estate, and as to this specialty only shall have an executor, and must have a Will proved: but in case he

Limited probate.

(*h*) *Webster v. Spencer*, 3 Barn. & Ald. 363, by Bayley, J.; *Cummins v. Cummins*, 3 J. & Lat. 64.

(*i*) 4 Burn, E. L. 310, Phillimore's edition; *In the goods of Bell*, L. R. 2 P. & D. 247. As to the practice on an application for an order on executors to supply information necessary for obtaining double probate, see *In the estate of Griffin*, 54 Sol. Jo. 378.

(*k*) Wentw. Off. Ex. 31, 14th edit.; Bac. Abr. Exors. (C.) 4.

(*l*) *Anon.*, 1 Freem. 313; *Anon.*, 1 Chan. Cas. 265. See *Watkins v. Brent*, 1 Myl. & Cr. 104.

(*m*) See *In the goods of Foster*, L. R. 2 P. & D. 304.

(*n*) 1 Cas. temp. Lee, 280; *Davies v. Queen's Proctor*, 2 Robert. 413; *In the goods of Beer*, *ib.* 349; and *vide post*, p. 298.

(*o*) Wentw. Off. Ex. 30, 14th edit.

makes another Will for the residue of his estate, both Wills must be proved. However, where there is an executor appointed without any limitation, the Court can only pronounce for the Will, or for an absolute intestacy: It cannot pronounce the deceased to be dead intestate as to the residue, though the executor may eventually be considered only to hold for the next of kin (*p*).

An executor named in a codicil may propound both the Will and codicil.

Where an executrix was appointed in a codicil, which gave her a legacy, and nominated her, together with an executor named in a previous Will, executor of the Will and codicil, declaring it to be a part of the Will, and giving them the residue in moieties, it was held that she had a right to propound both the Will and codicil, if she thought proper, though the other executor prayed probate of the Will alone, and opposed the codicil; for if the codicil was good, it was part of the Will, and gave her an immediate interest in the Will; and if she propounded and proved the codicil alone, the next of kin might afterwards oppose the Will, and force her into a second suit, which would be unreasonable (*q*).

Probate of a Will cannot be had during a *lis pendens* as to a codicil: unless by consent.

Probate of a Will cannot be granted to the executor while a contest subsists about the validity of a codicil; for that being undetermined, it does not appear what is the Will, and the executor cannot take the common oath (*r*). In a case (*s*), however, where a question arose as to the validity of a codicil revoking the appointment of a co-executor, and the estate required an immediate representation, probate of the undisputed instruments was granted to the other executors, with consent of the co-executor, reserving all questions (*t*).

Probate of codicil where

If a Will has been proved abroad, probate of the codicils,

(*p*) *Sutton v. Smith*, 1 Cas. temp. Lee, 275. See *Spratt v. Harris*, 4 Hagg. 408, 409. Cf. *Re Ford*, [1902] 1 Ch. 218, and [1902] 2 Ch. 605, where the Will became inoperative by the death of the sole legatee and executrix, and letters of administration with the Will annexed were granted.

(*q*) *Miller v. Sheppard*, 2 Cas. temp. Lee, 506.

(*r*) *Neagle v. Castlehaven*, 2 Cas. temp. Lee, 246.

(*s*) *Fowles v. Davidson*, 4 Notes of Cas. 149. And see Tristram & Coote's Probate Practice, 15th edit., p. 31, where a number of unreported cases are referred to.

(*t*) Where, however, there is no *lis pendens*, but the Court is informed of the existence of codicils abroad, which cannot be produced, the Court will, under special circumstances, grant probate of papers forming part only of the Will, the executor undertaking to prove the other papers or authentic copies thereof, when they arrive: *In the goods of Robarts*, L. R. 3 P. & D. 110.

if any, must be granted by the Court which granted probate of the Will (*v*).

Will has been proved abroad.

It has already appeared, that where there is a sole executor, or sole surviving executor, the office is transmissible, and his executor becomes the representative of the original testator (*w*): and in such a case, no new probate of the original Will is requisite (*x*).

Executor of executor.

Where a married woman, before the Married Women's Property Act, 1882, made a Will by virtue of a power, or of property enjoyed by her separately, such Will, as there has been already occasion to show, might be admitted to probate, without the consent of her husband (*y*). Where the Will sought to be established was made by her under a power, it was held that the instrument creating the power must be pleaded in the allegation of the executor, and exhibited (*z*). The probate, however, of the Will of a *feme covert* before the Act was not general, but limited to the property over which she had a disposing power (*a*). And her husband was entitled to have a grant of administration *cæterorum* (*b*).

Probate of the Will of *feme covert* before Married Women's Property Act, 1882.

Limited form of probate.

As has already been stated, since the commencement of the Married Women's Property Act, 1882, the limitation in the probate of the Will of a married woman, to which reference has been made above, is no longer required, and the Court will make a general grant (*c*). The effect of the general probate is

Probate of Will of *feme covert* since the Married Women's Property Act, 1882:

no longer limited but general grant.

(*v*) *In the goods of Miller*, 8 P. D. 167.

(*w*) *Ante*, pp. 174, 175.

(*x*) *Wankford v. Wankford*, 1 Salk. 309.

(*y*) See *ante*, p. 43.

(*z*) *Temple v. Walker*, 3 Phillim. 394; *In the goods of Monday*, 1 Curt. 590. And by Rule 15 (1862), P. R. (Non-contentious) now repealed, it must have been specified in the grant of the probate, &c. See *ante*, p. 46.

(*a*) *Tappenden v. Walsh*, 1 Phillim. 352; *Tucker v. Inman*, 4 M. & G. 1049; *Ledgard v. Garland*, 1 Curt. 286. See *In the goods of Boswell*, 3 Curt. 744; *In the goods of Martin*, 3 Sw. & Tr. 1; *In the goods of De Pradel*, L. R. 1 P. & D. 454; *In the goods of Richards*, L. R. 1 P. & D. 156; *In the goods of Cubbon*, 11 P. D. 169; *In the goods of Tharpe*, 3 P. D. 76. And see *ante*, p. 46.

(*b*) *Brenchley v. Lynn*, 2 Robert. 441, 471. See 4 M. & G. 398, per Tindal, C. J.

(*c*) *In the goods of Price*, 12 P. D. 137. See also *In the goods of Homfray*, *ib.* 138, n.; *Re Lambert*, 39 C. D. 626. And see *ante*, p. 46. These cases were decided upon the New Rules of April, 1887, Rules 15 and 18, which are set out in *In the goods of Price*, *ubi supra*. There are, however, cases in which the Court still refuses to make a general grant in respect of the Wills of married women—*e.g.*, where a married woman who is not a British subject has made a Will which, though

only to enable the executor to get in all the assets of the wife whether she has power to dispose of them or not, and it does not affect the beneficial title to them (*d*).

Where upon the death of a woman married before the commencement of the M. W. P. Act, 1882, it appeared that before her marriage she had acquired a mortgage-debt, which her husband had not reduced into possession, and had since her marriage made a Will purporting to dispose of all her real and personal property, the Court made a grant to her husband of administration to such of her property as she had no power to dispose of by Will (*e*).

In general cases, if the Will be limited to any specific effects of the testator, the probate shall also be so limited, and an *administratio cæterorum* granted (*f*).

When the Will is proved, the original is deposited in the registry (*g*), and a copy thereof is made out under the seal of the Court, and delivered to the executor, together with a certificate of its having been proved; and such copy and certificate are usually styled the probate.

There has already been occasion to explain the nature of a probate in *fac-simile*, and the occasions on which such a probate is granted (*h*). The operation of it will be further considered hereafter, together with the subject of the effect of probate, and letters of administration generally (*i*).

valid as the exercise of a power of appointment, is not valid by the law of the testatrix's domicile: *In the goods of Tréfond*, [1899] P. 247; *In the goods of Vannini*, [1901] P. 330.

(*d*) *Stanton v. Lambert*, 39 Ch. D. 626; *Smart v. Tranter*, 43 C. D. 587; and see *ante*, p. 46.

(*e*) *In the goods of Leman*, [1898] P. 215, where the form of order is given. See also *In the goods of Donovan*, 78 L. T. 567; and see *ante*, p. 46, n. (*u*).

(*f*) *Wentw. Off. Ex.* 30, 14th edit.; *Toller*, 67.

(*g*) See stat. 20 & 21 Vict. c. 77, s. 66, by which provision is made for a place for the deposit of original Wills when proved: *ante*, p. 224. On one occasion, an original codicil, of which probate had been granted, containing an assignment of 10,000*l.* part of 15,000*l.* secured by a heritable bond in Scotland, was delivered out of the Registry of the Prerogative Court, in order to its being registered in Scotland, and there finally deposited; this being necessary to carry the same into effect, and the codicil itself (termed in Scotland a deed of disposition or assignation) not relating to any property of the testator in this country: *In the goods of Nicholson*, 2 Add. 333. See also *In the goods of Russell*, 1 Hagg. 91; *Re Napoleon Bonaparte*, 2 Robert. 290. As to production in Court of original Will, see *ante*, p. 225, and *post*, p. 302.

(*h*) *Ante*, p. 234.

(*i*) *Post*, Pt. I. Bk. VI. Ch. I.

*Administratio
cæterorum.*

Probate,
making out :

deposit of
Will in
Registry.

Probate in
fac-simile.

If a Will be in a foreign language, the probate is granted of a translation of the same by a Notary Public (*k*). But it would seem that the Court of Construction is not bound by it, and may themselves correct any inaccuracy in it (*l*). Probate of Will in a foreign language.

Where the probate is lost, the Spiritual Court never granted a second, but merely an exemplification of the probate from their own records, and such exemplification was evidence of the Will having been proved (*m*). Lost probate.

The probate may be revoked either on suit by citation (*e.g.*, where the executor, after proof in common form, is cited to prove the Will in solemn form, or even after proof in solemn form, where the probate is shown to have been obtained by fraud, or the Will of which it has been granted is proved to have been revoked, or a later Will made) (*n*), or on appeal to a higher tribunal. But it will be more convenient to consider the mode of such revocation, and its consequences, at a future stage, conjointly with the revocation of grants of administration (*o*). Revocation of probate on citation or appeal.

SECTION VIII.

Of Mandamus to compel Probate.

As matters testamentary in which, before the passing of the Judicature Act, the Court of Probate had exclusive jurisdiction, are by that Act assigned to the Probate Division of the High Court, it seems clear that the power to compel probate by Mandamus no longer exists. No longer power to compel probate by mandamus.

The King's Bench Division in which, as the successors of the old Court of Queen's Bench, the right to issue a Mandamus is vested, is powerless to control by Mandamus the proceedings of any but an Inferior Court; and thus it has no power to superintend or control the Judges of another Division of the

(*k*) Toller, 72. It seems that the executor is sworn to the foreign original, but the translation alone is engrossed and registered: Tristram & Coote, 15th edit., p. 58.

(*l*) *L'Fit v. L'Batt*, 1 P. Wms. 526; *post*, Pt. I. Bk. VI. Ch. I. And see *In re Cliff's Trusts*, [1892] 2 Ch. 229, where the report of *L'Fit v. L'Batt* was corrected, and it was held that, none of the parties insisting upon an application being made to the Probate Division to correct the English translation, the Court was entitled to look at the French original as well as at the English translation.

(*m*) *Shepherd v. Shorthose*, 1 Stra. 412.

(*n*) Wentw. Off. Ex. 111, 112, 14th edit.

(*o*) *Post*, Pt. I. Bk. VI. Ch. II.

same Court, should they exceed their authority or decline to exercise the jurisdiction which they possess.

In the earlier editions of this Work, Pt. I. Bk. IV. Ch. II. § 8, will be found a reference to the power of the Temporal Courts, formerly existing over the Ecclesiastical Courts exercised by Mandamus or Prohibition.

SECTION IX.

Of what Instruments Probate is necessary, and what Instruments ought not to be proved.

Probate must be obtained of every testamentary instrument.

If an instrument be testamentary (*p*), whatever may be its form, probate of it must be obtained in the Probate Division; otherwise its existence cannot be recognized in any Court of Law or Equity.

No probate of paper neither disposing of property nor appointing executor, nor of a writing merely revoking former Wills.

A paper which neither disposes of property nor appoints an executor generally speaking has no testamentary character so as to enable the Court to grant probate of it (*q*).

It was at one time considered that a codicil, not containing any disposition of property, but simply revoking all former Wills, is of a testamentary nature, and ought to be admitted to probate (*r*). But it has since been decided that a writing declaring an intention to revoke a former Will, by which the deceased in no way disposes of property, is neither Will nor codicil, and cannot be admitted to probate (*s*). But if the executor, after probate, discovers any testamentary paper, he ought to bring it into the Court of Probate, even though it be a mere confirmation of the Will already proved (*t*).

Prior to the Land Transfer Act, 1897, a Will *clearly* respecting land only, and not personal property, and not appointing an

Formerly a Will of lands only could not have been proved :

(*p*) As to what is a testamentary instrument, see *ante*, p. 78 *et seq.*, and *post*, Pt. III. Bk. v. Ch. II.

(*q*) *Van Straubenzee v. Monk*, 3 Sw. & Tr. 6.

(*r*) *Brenchley v. Still*, 2 Robert. 162. In that case, however, the document did contain an expression of the testatrix's wishes as to the devolution of her property. The decision was followed by Lord Penzance, though with doubt, in *In the goods of Hubbard*, L. R. 1 P. & D. 53; *In the goods of Hicks*, *ibid.*, p. 683.

(*s*) *In the goods of Fraser*, L. R. 2 P. & D. 40; *In the goods of Eyre*, [1905] 2 Ir. R. 540. *Secus*, where the writing contains dispositions of a testamentary character: *In the goods of Durance*, L. R. 2 P. & D. 406. The practice is to make a grant as on intestacy without annexing the writing: *Toomer v. Sobinska*, [1907] P. 106.

(*t*) *Weddall v. Nixon*, 17 Beav. 160.

executor could not have been proved in the Court of Probate or Probate Division (*u*); but now such a Will, in the case of a testator dying after the commencement of the said Act, may be proved in the Probate Division (*w*).

But a Will concerning both lands and goods had to be proved entirely in the Court of Probate (*x*); and the nomination of executors in a testamentary paper, purporting to dispose of real property only, entitled the document to probate (*y*). And notwithstanding the renunciation of the executor administration, was granted with the Will annexed (*z*). This rule, however, did not hold good in the case of the Will of a married woman made under a power of appointment, and disposing of real property only: for the Will, although it was in the form of a Will as required by the instrument giving the power, is, in fact, a conveyance exercised by means of the appointment, and, although an executor was appointed, he took nothing in his character of personal representative. If, however, a married woman making a Will disposing of realty only, and appointing executors (*a*), had not only a power of appointment given her by the deed, but also a vested interest to her separate use in the real property apart from that power, and she really exercised, not only what rights she had under the power, but the rights which she had beyond it, she was in the position of a *feme sole* with regard to the real estate, and the Will was entitled to probate (*b*). And since the Land Transfer Act, 1897, the Will of a married woman dying after the commencement of that Act, made under a power of appointment and disposing of real property only, but appointing an executor, is, it would seem, entitled to probate; and administration with such Will annexed, would, it would seem, be granted where no executor is appointed (*c*).

seems, of a mixed Will of lands and goods: or where executors are appointed in a Will of Lands only. Probate of Will of married woman made under power disposing only of real property.

(*u*) *Habergham v. Vincent*, 2 Ves. 230, by Buller, J.; *In the goods of Drummond*, 2 Sw. & Tr. 8; *In the goods of Bootle*, L. R. 3 P. & D. 177.

(*w*) Land Transfer Act, 1897, s. 1 (3).

(*x*) *Partridge's Case*, 2 Salk. 553.

(*y*) *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; *In the goods of Barden*, L. R. 1 P. & D. 325; *In the goods of Leese*, 2 Sw. & Tr. 442; *Brownrigg v. Pike*, 7 P. D. 61; *In the goods of Cubbon*, 11 P. D. 169; *In the goods of Hornbuckle*, 15 P. D. 149, 151. See also *Beard v. Beard*, 3 Atk. 72, and *ante*, p. 151. See further *In the goods of Lancaster*, 1 Sw. & Tr. 464.

(*z*) *In the goods of Jordan*, L. R. 1 P. & D. 555.

(*a*) *In the goods of Tomlinson*, 6 P. D. 209.

(*b*) *In the goods of Hornbuckle*, 15 P. D. 149.

(*c*) See *ante*, p. 43.

Mode of
proving
devise of
land.

In the case of a Will which disposed of land and personal property, formerly, if there was occasion to prove the devise of the land, in an action concerning it, it was necessary to give the Will itself in evidence; but since the Court of Probate Act, 1857, if notice is given of the intention to put the probate in evidence, the probate is sufficient evidence of the Will and its validity, unless the party, to whom such notice has been given, shall himself give notice that he intends to dispute the validity of the Will (*d*), and it would seem that in the case of testators dying after the commencement of the Land Transfer Act, 1897, the probate is the proper evidence of the Will of real estate to which that Act applies.

Production of
original
Will: how
procured.

When an original Will is required to be produced in Court, the attendance with it of the proper officer, in whose custody it is deposited, may be procured in the same manner as in other cases where the production of an original record, or instrument in the nature of a record, is required (*e*).

Where it was
doubtful
whether all
the property
was freehold,
probate was
granted.

If it was *doubtful* whether some part of the property was freehold, the Ecclesiastical Court always held, that it ought to grant probate; for the obvious reason that the probate might be necessary to the purposes of justice, and no evil would arise from the grant of it (*f*).

Probate
necessary of
a Will made
in execution
of a power.

A Will made in execution of a power is required to be proved (*g*).

But though a Court of Equity cannot give effect to testamentary papers without probate, it may, perhaps, when necessary, order an enquiry for the very purpose of sending such papers to be proved (*h*).

Probate of
sealed packets
directed by
the Will to be
delivered un-
opened to
legatees.

In *Pelham v. Newton* (*i*), a testatrix directed her executor to deliver certain parcels sealed up, and directed to certain persons, which were in a small iron chest, to the persons to whom they were directed, unopened, and desired those persons would not tell one another what was contained in their respective papers: Sir G. Lee was of opinion that the executors could not safely

(*d*) Stat. 20 & 21 Vict. c. 77, s. 64. See *ante*, p. 226.

(*e*) See *ante*, pp. 225, 226.

(*f*) By Sir John Nicholl, in *Thorold v. Thorold*, 1 Phillim. 8, 9. See also the case of *Durkin v. Johnstone*, Prerog. 1796, decided by Sir W. Wynne, and reported in a note to 1 Phillim. 8.

(*g*) See Sugd. on Pow. 21, 6th edit.; *Tatnall v. Hankey*, 2 Moo. P. C. 342, 351, 352, 353; *Goldsworthy v. Crossley*, 4 Hare, 140; *In re Vallance*, 24 Ch. D. 177. And *vide ante*, pp. 50, 53.

(*h*) See *Brenchley v. Lynn*, 2 Robert. 458 *et seq.* by Dr. Lushington.

(*i*) 2 Cas. temp. Lee, 46.

deliver them unopened; for if they should be called to an inventory, they could not give in one on oath, without knowing what was contained in those parcels; and if they assented to them as legacies, and there should not be assets sufficient to pay the debts, they would be guilty of a *devastavit*: The learned judge therefore decreed those parcels to be opened in the presence of the Registrar, to see what was contained in them: They were accordingly opened in Court, and they contained bank-notes, some of 20*l.*, and some of 30*l.* each, of which a schedule was made, of the names of the persons, and of the sum contained under each person's name, to be added as a codicil to the Will: and probate was decreed of the Will, and all the aforesaid papers, to the executors.

In *Inchiquin v. French (k)*, Lord Thomond by his Will gave 20,000*l.* to Sir William Wyndham; and by a deed poll of the same date, which referred to his Will, he declared that the legacy was given to him upon trust for Lord Clare: Sir William Wyndham died in the testator's lifetime, and the deed poll was not proved: The question was, whether, though the legatee named in the Will had died before the testator, the person, who was the *cestui que trust* of the legacy, and was substantially the legatee, was entitled to the 20,000*l.* under the deed poll, which had not been proved as a testamentary paper: Lord Hardwicke held, that the deed poll, though never proved, sufficiently declared the trusts of the legacy of 20,000*l.*, and decreed accordingly.

Instruments
of which
probate is not
necessary:
Declaration
of trust:

In *Smith v. Attersoll (l)*, a testator bequeathed a legacy to A.

(*k*) 1 Cox, 1. This case is also reported in Ambler, p. 33, and it would seem from the judgment of Hall, V.-C., in *Re Fleetwood*, 15 Ch. D. p. 603, that the report in 1 Cox, upon which Lord Gifford relied in his judgment in *Smith v. Attersoll*, referred to on this page, is incorrect in that the question of whether there was a trust was not really decided; but as Hall, V.-C., points out, *Smith v. Attersoll* has been referred to in subsequent cases.

(*l*) 1 Russ. Chanc. Cas. 266. As to the cases in which a Court of Equity will give effect to a trust not disclosed, or not fully disclosed, in the testamentary instrument, and as to what evidence is admissible, see *Moss v. Cooper*, 1 J. & H. 352, 367; *Irvine v. Sullivan*, L. R. 8 Eq. 673. The cases are reviewed by Hall, V.-C., in *Re Fleetwood*, 15 Ch. D. 603. And see *Re Stead*, [1900] 1 Ch. 237; *Re Maddock*, [1902] 2 Ch. 220; *Re Pitt-Rivers*, [1902] 1 Ch. 403; *Geddis v. Semple*, [1903] 1 Ir. R. 73; *Balfe v. Halfpenny*, [1904] 1 Ir. R. 486; *O'Brien v. Condon*, [1905] 1 Ir. R. 51; *Re Hickey*, [1913] 1 Ir. R. 390; *Le Page v. Gardner*, 84 L. J. Ch. 749; *Re Levesley*, 32 T. L. R. 145; *Tharp v. Tharp*, [1915] W. N. 410. The ground upon which effect is given

and B., in trust for certain purposes, which the Will stated to have been fully explained to them; on the same day a paper writing was signed by A. and B. in which they declared that the bequest was upon trust for six persons, whose names were stated; and after their signature, some lines were added in the handwriting of the testator, by which a seventh person (an unborn child) was admitted to a share of the legacy: Upon a bill, filed by one of the six persons named in the body of the paper writing, Lord Gifford, M.R., recognised the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper.

It is not necessary that a Will simply appointing testamentary guardians should be proved (*m*).

Prior to the Land Transfer Act, 1897, it was not necessary to prove a Will in the Court of Probate, to entitle a legatee to recover a legacy out of real estate (*n*).

In the case of *In the goods of Gunn* (*o*), Sir James Hannen held that since the passing of the Judicature Acts and the fusion of all the Courts into one, each Court having to ascertain what the law is, legal or equitable, a Will disposing of freehold

to non-testamentary documents is not as acts of the testator, but rather as trusts binding on the conscience of the legatee. If the trust is expressed on the face of the Will, but the trusts are not fully declared, no trust afterwards declared by a paper not executed as a Will could be binding: *Johnson v. Ball*, 5 De G. & Sm. 85; *Briggs v. Penny*, 3 Mac. & G. 546; *Singleton v. Tomlinson*, 3 App. Cas. 404; *Re Gardner*, [1920] 1 Ch. 501. But the legatee will not, in such a case, take a beneficial interest, but will be treated as trustee for the next of kin: *Re Boyes*, 26 Ch. Div. 535. On the same principle the Court will enforce the trust where no trust appears on the face of the Will, provided the Court is satisfied that there has been a communication by the testator and acceptance by the legatee: *Re Boyes*, 26 Ch. D. 531. And it would appear that a trust by communication with the legatee may be created by a communication subsequent to the Will: *Moss v. Cooper*, 1 J. & H. 352, 367; but the trust must be communicated in the lifetime of the testator: *Re Boyes*, 26 Ch. D. 531. And see *Re Stead*, [1900] 1 Ch. 237. It was at one time supposed that parol evidence was not admissible to prove the trusts in cases where the trust is referred to in the Will, and that such evidence was excluded by the effect of the Wills Act; but it would appear from *Re Fleetwood*, 15 Ch. Div. 594, that this distinction between the case of a trust mentioned on the face of the Will and a trust, the existence of which is undisclosed, cannot be supported. And see *post*, p. 1222.

(*m*) *Gilliat v. Gilliat*, 3 Phillim. 222; *Lady Chester's Case*, 1 Ventr. 207; *In the goods of Morton*, 3 Sw. & Tr. 422.

(*n*) *Tucker v. Phipps*, 3 Atk. 361.

(*o*) L. R. 9 P. D. 242. And see *Attorney-General v. Marquis of Ailesbury*, 12 A. C. at p. 696.

A Will simply appointing testamentary guardians need not be proved.
Will giving legacies out of real estate.
Will disposing of freeholds considered per-

property which by the doctrine of equitable conversion was to be considered as personalty was entitled to probate. Prior to the passing of these Acts it was otherwise (*p*). sonalty by
equitable
conversion.

The proceeds of real property sold under the Settled Estates Acts, and not yet converted into realty, were held not to have become personal property in respect of which the Court of Probate had jurisdiction (*q*).

But since the Land Transfer Act, 1897, as there has already been occasion to point out, Wills disposing only of real property can be proved in the Probate Division (*r*).

(*p*) *In the goods of Barden*, L. R. 1 P. & D. 325.

(*q*) *In the goods of Lloyd*, 9 P. D. 65.

(*r*) Land Transfer Act, 1897, s. 1 (3); *ante*, p. 301.

CHAPTER THE THIRD.

THE MAKING AND PROBATE OF THE WILLS OF
SOLDIERS, SEAMEN AND MARINES.

Wills of
soldiers, sea-
men and
marines.

IT has already been stated, that the Statute of Frauds contains an exception as to Wills made by "any soldier being in actual military service, or any mariner or seaman being at sea" (a). This exception is continued by 1 Vict. c. 26, by the 11th sect. of which it is provided and enacted, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act" (b).

With regard to the Wills of seamen and marines and the disposal of their effects, various other statutes have been passed from time to time. Those which are now in force are the Navy and Marines (Wills) Acts, 1865, 1897, and 1914 (28 & 29 Vict. c. 72; 60 Vict. c. 15, and 5 Geo. V. c. 17); The Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111), and an Order in Council of Dec. 28th, 1865.

Stat. 28 & 29
Vict. c. 72,
s. 2.

Interpreta-
tion clause.

By the Navy and Marines (Wills) Act, 1865, s. 2, the term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of his Majesty's vessels, or otherwise belonging to his Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen (c).

Sect. 3.

Will made
before entry
ineffectual as
to wages, &c.

3. "A Will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty."

(a) See *ante*, p. 87.

(b) See *ante*, p. 88 *et seq.*

(c) This definition is not so wide as the meaning which has been put upon the term "mariner or seaman" within sect. 11 of the Wills Act. See *ante*, p. 89. For a list of persons *excluded* from the operation of the Acts, see Tristram & Coote, 15th edit., pp. 599, 600.

4. "A Will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment or instrument with a power of attorney" (*d*).

Sect. 4.
Will invalid
if combined
with power
of attorney.

5. "A Will made after the commencement of this Act by any person while serving as a seaman or marine, [or when he has ceased so to serve,] (*e*) shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:—

Sect. 5.
Regulations
for Wills of
seamen, &c.,
as to wages,
&c.

(1.) Every such Will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea;

(2.) Where the Will is made on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force;

(3.) Where the Will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain, or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the Will is executed, or a British consular officer, or an officer of customs, or a notary public [or a solicitor or in Scotland a law agent] (*f*).

A Will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England; and the person taking out representation to the testator under such Will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects."

(*d*) See *ante*, p. 36.

(*e*) The words in brackets have been repealed by 60 Vict. c. 15.

(*f*) The words in brackets have been added by 60 Vict. c. 15.

Sect. 6.
As to Wills
made by
prisoners of
war.

6. "Notwithstanding anything in this or any other Act, a Will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:—

- (1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public;
- (2.) If the Will is made according to the forms required by the law of the place where it is made;
- (3.) If the Will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea."

Sect. 7.
Payment
under Will
not in con-
formity with
Act.

7. "Notwithstanding anything in this Act, in case of a Will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or a seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such Will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with."

Stat.
5 Geo. 5,
c. 17, s. 1.
Power of
Admiralty to
dispense with
provisions of
Navy and
Marines
(Wills) Acts,
1865 and
1897.

The Navy and Marines (Wills) Act, 1914, s. 1, enacts: "Notwithstanding anything in the Navy and Marines (Wills) Acts, 1865 and 1897, the Admiralty may, in the case of a Will made by any person being or having been a seaman or marine who may have died or may hereafter die during or in consequence of the present war, pay or deliver any wages, grant, or other allowance, or other money payable by the Admiralty, or effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such Will though not made in conformity with the provisions of the said Acts, if the

Admiralty are of opinion that compliance with the requirements of those Acts may be properly dispensed with."

By the Order in Council of Dec. 28th, 1865, it is provided: Order in
Council, Dec.
28, 1865.
Sect. 3, that in the office of the inspector of seamen's Wills there shall be a repository for the Wills of seamen and marines. S. 3:
Sect. 4, that such Wills intended to pass naval assets (defined by sect. 2 to be all property affected by the Navy and Marines (Property of Deceased) Act, 1865) may, as soon as practicable after execution, be sent to the Secretary of the Admiralty to be examined by the inspector. S. 4:
Sect. 5, that the Will is to be registered by the inspector, together with certain particulars therein mentioned. S. 5:
Sect. 6 provides for the return to the intending testator of a Will, which appears to the inspector to be invalid on account of any informality or of non-accordance in any respect with the Navy and Marines (Wills) Act, 1865, or otherwise, and for the statement in writing of his objection and the mode of removing it. S. 6:
Sect. 7 provides for the stamping of a Will which appears valid, for its being placed under seal in the repository provided, and for the issue of a receipt for it to the testator. S. 7:
Sect. 8 provides that: "With reference to every such Will the inspector shall also proceed as follows:— S. 8:
(1) He shall, with all convenient speed, issue to the person appointed executor, if any, a cheque of the Will, not giving any information respecting the testator's disposition of his property, but containing directions as to the steps to be taken on the testator's death. (2) If there is not any person appointed executor, then, with the assent of the testator, either implied by the mode of transmission of the Will to the Admiralty office or expressed, but not otherwise, he shall with all convenient speed issue to the residuary or the universal legatee, or other person most beneficially interested under the Will, a cheque in lieu of the Will, containing directions as to the steps to be taken on the testator's death. (3) If in any such last mentioned case, by reason of the absence of such assent, a cheque is not issued in the testator's lifetime then he shall, with all convenient speed, after the testator's death issue to the residuary or the universal legatee, or other person most beneficially interested under the Will, a cheque in lieu of the Will, containing directions as to the steps to be taken in consequence of the testator's death."

Sect. 9 provides for the case of a Will not deposited by the testator in his lifetime that it shall be sent as aforesaid by the executor or other person having possession of it. S. 9:
Sect. 10 con- S. 10:

s. 11: tains the same provisions for Wills deposited after the testator's death as sect. 5. Sect. 11 provides in cases where the Will appears invalid, as in sect. 6, that the inspector shall as soon as may be give notice in writing to the executor, or if none to the residuary or universal legatee, or other person most beneficially interested under the alleged Will, informing him that it is stopped and stating the reason. Sect. 12 provides that where the Will appears valid the inspector shall have it stamped and issue to the executor, or if none to the residuary or universal legatee, or other person most beneficially interested under the Will, a cheque in lieu of the Will containing directions as to the steps to be taken in consequence of the testator's death.

s. 12:

s. 13: Sect. 13. "Where a seaman or marine dies leaving a Will, and a cheque has been issued in pursuance of the foregoing provisions, the following steps shall be taken (in cases where this course of proceeding is applicable) by and with respect to the holder of the cheque:—(1) The officiating minister of the parish or district parish wherein the holder of the cheque resides shall on his request examine him and two inhabitant householders of the parish produced by him for the purpose. (2) In the presence of the minister, the holder of the cheque shall sign the application, and the householders shall sign the certificate subjoined to the cheque (all blanks being first filled up according to truth, and the minister having first read over to the holder of the cheque and householders the caution printed on the cheque), for which purpose the holder of the cheque and householders shall attend at such time and place as the minister appoints. (3) The minister being, on examination of the holder of the cheque and householders, satisfied of the truth of their statements, and of the holder of the cheque being the executor, or other person therein described as qualified to act, and of the persons certifying being inhabitant householders of the parish, and having seen the parties sign the application and certificate respectively, shall add a description of the height, complexion, colour of eyes and hair and age of the holder of the cheque and of any observable peculiarities of person about him, and shall certify to the several particulars by subscribing his signature thereto. (4) The holder of the cheque shall, before signing the application, pay to the minister a fee of 2s. 6d. for his trouble in the matter. (5) The application and certificates being completed, the minister shall return them with the cheque addressed as directed."

s. 14:

Sect. 14. "If the inspector, on the return of the cheque,

application, and certificates, is satisfied of the right of the claimant he shall proceed as follows:—(1) In case representation is required or intended to be taken out, he shall indorse on the original Will a certificate (in such form and to such effect as he thinks fit) to enable the claimant to take out representation, and shall deliver the Will to the claimant; and probate, obtained in accordance with the certificate, being produced to the inspector and registered and being indorsed by him as available for receipt of naval assets, shall be so available. (2) In case representation is not required or intended to be taken out, the inspector shall issue to the claimant a certificate, which shall be available for receipt of naval assets, without probate.”

Sect. 15. “If the inspector, on the return of the cheque, s. 15:
application, and certificates, is not satisfied of the right or fitness of the claimant, he may (by indorsement on the original Will) certify to that effect, and that he declines to interfere; or if he thinks fit, he may (by indorsement on the original Will) certify his objections for the information of the Court out of which representation would be taken, and if the Court thinks fit to grant probate to the claimant, the same, being produced to the inspector and registered, shall be indorsed by him as available for receipt of naval assets and shall be so available accordingly.”

Sect. 16 provides that the minister shall advise the Admiralty s. 16:
by letter of his reasons if he is not satisfied that the holder of the cheque is the person qualified to act according to it.

Sect. 17 provides that, where probate has been obtained with- s. 17.
out the inspector's certificate, and naval assets form part of the effects, the inspector may, if satisfied that representation has been obtained by the proper person, admit the probate as authority for the receipt of naval assets by indorsement thereon, and that it shall be available accordingly.

For further information as to the disposal of money and effects under the control of the Admiralty belonging to deceased officers, seamen and marines of the Royal Navy, and marines and other persons, see stat. 28 & 29 Vict. c. 111, the Order in Council just referred to and Tristram & Coote's Probate Practice, Pt. I. Ch. III. With regard to the Wills of merchant seamen, the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) 57 & 58 Vict.
c. 60. provides, by sections 176, 177, 178 and 179, for the mode of payment by the Board of Trade of the money and effects of deceased seamen and apprentices (g).

(g) And see *ante*, p. 37, and also *post*, Pt. I. Bk. v. Ch. II. § IV.

BOOK THE FIFTH.

THE ORIGIN OF ADMINISTRATION: AND OF THE
APPOINTMENT OF ADMINISTRATORS.

CHAPTER THE FIRST.

IN WHAT COURT ADMINISTRATION MUST BE TAKEN OUT: AND
THEREWITH OF WHAT MAY BE DONE BY THE ADMINISTRATOR
BEFORE LETTERS OF ADMINISTRATION ARE GRANTED.

IN case a party makes no testamentary disposition of his property, he is said to die intestate (*a*): the consequences of which it is now proposed to consider.

SECTION I.

In what Court the Letters of Administration shall be obtained.

In ancient time, when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is *parens patriæ*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood (*b*). This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the County Court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and

Ancient prerogative of the Crown:

(*a*) 2 Black. Comm. 494.

(*b*) *Hensloe's Case*, 9 Co. 38, *b*.

others, who had, until the passing of the Court of Probate Act, a prescriptive right to grant administration to their intestate tenants and suitors in their own Courts Baron and other Courts (c). Afterwards the Crown, in favour of the Church, transferred to the prelates: invested the prelates with this branch of the prerogative: for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased, than the Ordinary, who all his life had the cure and charge of his soul. The goods of the intestate being thus vested in the Ordinary, as trustee (d) to dispose of them *in pios usus*, it has been said that the clergy took to themselves (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and children had been deducted, without paying even his lawful debts and charges thereon: until by stat. Westm. 2 (13 Edw. I. c. 19), it was enacted that the Ordinary should be bound to pay the debts of the intestate as far as his goods extended, in the same manner that executors were bound in case the deceased had left a Will (e). However in *Snelling's Case*, it was resolved that, if the Ordinary took the goods into possession, he was chargeable with the debts of the intestate at common law, and that the stat. Westm. 2 was made in affirmance of the common law (f). But though the Ordinary was (either at common law, or by force of this statute,) liable to the creditors for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in his hands, to be applied to whatever purposes the conscience of the Ordinary should approve. The flagrant abuses of which power occasioned the Legislature to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: and therefore the statute of 31 Edw. III. st. 1,

by stat.
Westm. 2,
Ordinary
bound to pay
debts of
intestate:

(c) 2 Black. Comm. 494. See *ante*, p. 201.

(d) The clergy had never, at any time, in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession for the latter purpose: *Dyke v. Walford*, 5 Moo. P. C. 434.

(e) 2 Black. Comm. 495. The 32nd article of the Magna Charta, extorted from King John, expressly provides against these abuses; but it is a curious fact, and one which strongly marks the influence of the papal power in England at that period, that this article was wholly omitted in the Magna Charta of Henry III.: note to *Warwick v. Greville*, 1 Phillim. 124, by the learned reporter.

(f) 5 Rep. 82, b. See also *Hensloe's Case*, 9 Rep. 39, b, where Lord Coko lays down the same law, and cites several authorities in support of it: Com. Dig. Administrator (A.).

31 Edw. III. stat. 1, administration to be granted to the next and most lawful friends; whence originated administrators.

c. 11, provides, "that in case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods: which persons so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate, in the King's Court, to administer and dispend for the soul of the dead: and shall answer also in the King's Court, to others to whom the said deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament, as well as of the time past as the time to come."

This is the original of administrators, as they stood at the time of the passing of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77) (*g*). They were the officers of the Ordinary appointed by him in pursuance of the statute (*h*), and their title and authority were derived exclusively from the Ecclesiastical Judge, by grants which are usually denominated letters of administration.

As already mentioned (*i*), by the 3rd section of the Court of Probate Act, 1857, the jurisdiction of the Ecclesiastical and all other Courts to grant letters of administration of the effects of deceased persons was abolished; and by sect. 4 (*k*), that jurisdiction was to be exercised in the Queen's name by the Court of Probate.

The jurisdiction of the Court of Probate was by the Judicature Act transferred to, and is now exercised by, the Probate Division of the High Court of Justice (*l*).

SECTION II.

What may be done by an Administrator before Letters of Administration are granted.

It has been shown that an executor may perform most of the acts appertaining to his office, before probate (*m*). But with respect to an administrator, the general rule is, that a party entitled to administration can do nothing as administrator

(*g*) 2 Black. Comm. 495.

(*h*) *Ibid.*

(*i*) *Ante*, p. 202.

(*k*) *Ante*, p. 202.

(*l*) 36 & 37 Vict. c. 66, s. 16. See *ante*, p. 203.

(*m*) *Ante*, p. 213 *et seq.*

By the Court of Probate Act, 1857, s. 3, jurisdiction of Ecclesiastical Courts to grant administration is abolished. By sect. 4 to be exercised in the Court of Probate: and now exercised by Probate Division of High Court.

Generally an administrator cannot act before letters:

before letters of administration are granted to him; inasmuch as he derives his authority, not like an executor from the Will, but entirely from the appointment of the Court (*n*).

Thus it was always held at law that an executor might commence an action before proving the Will, and it was, generally speaking, sufficient if he had probate in time for the hearing (*o*), yet letters of administration must issue before the commencement of a suit at law by an administrator; for he has no right of action until he has obtained them (*p*).

he cannot
commence
action at law :

In Chancery, however, the practice was not quite so strict, for a bill in Chancery could be filed before a plaintiff had taken out letters of administration and it was sufficient to have them at the hearing (*q*), but the bill had to allege that they were already obtained (*r*). This difference of practice seems to remain notwithstanding the Judicature Act (*s*).

although he
may com-
mence action
in Chancery
Division.

So if an executor releases before probate, such act will bind him after he has proved the Will (*t*); but if a man releases and afterwards takes out letters of administration, it will not bar him: for the right was not in him at the time of the release (*u*).

A release by
an adminis-
trator before
letters not
binding.

So though an executor may assign a term for years of the testator, before probate, yet an assignment by an administrator before letters is, it seems, of no validity (*w*). Again, if the deceased was a tenant from year to year, a surrender of this leasehold interest cannot be made by a next of kin before taking out letters of administration (*x*).

Assignment
or surrender
by adminis-
trator before
letters not
valid.

(*n*) *Wankford v. Wankford*, 1 Salk. 301, by Powys, J.; and see *Creed v. Creed*, [1913] 1 Ir. R. 48.

(*o*) See *ante*, pp. 218, 219.

(*p*) *Martin v. Fuller*, Comb. 371; Com. Dig. Admon. B. 9; 1 Salk. 303, by Powell, J.; *Wooldridge v. Bishop*, 7 B. & C. 406. An administrator with the Will annexed has no more right in this respect than any other administrator: *Phillips v. Hartley*, 3 C. & P. 121.

(*q*) *Fell v. Lutwidge*, Barnard. Chanc. Cas. 320, by Lord Hardwicke, who observed that it was different at law: *Horner v. Horner*, 23 L. J. Ch. 10. See also as to the relation of the letters obtained after bill filed: *Humphreys v. Humphreys*, 3 P. Wms. 351; *Bateman v. Margerison*, 6 Hare, 496. But see *Simons v. Milman*, 2 Sim. 241; *Jones v. Howells*, 2 Hare, 353. See *ante*, p. 218.

(*r*) *Humphreys v. Ingledon*, 1 P. Wms. 753; *Moses v. Levi*, 3 Y. & Coll. 359, 366.

(*s*) *Tattersall v. Ashworth* (1903), cited in the Annual Practice, 1919, p. 161.

(*t*) *Ante*, p. 213.

(*u*) *Middleton's Case*, 5 Co. 28, b.

(*w*) 3 Preston on Abst. 146. See *Bacon v. Simpson*, 3 Mees. & W. 87, per Parke, B.

(*x*) *Rex v. Great Glenn (Inhabitants of)*, 5 B. & Adol. 188.

In *Doe v. Glenn* (*y*), the lessee of premises, under a condition of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances: His brother administered *de son tort*; and agreed with the landlord to give him possession, and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear: The brother afterwards took out letters of administration: And it was held, that his agreement as administrator *de son tort* did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made demand of the rent according to the common law, or proceeded by ejectment according to stat. 4 Geo. II. c. 28.

Accordingly it was held in a subsequent case (*z*), that an administrator was not estopped by a mortgage he had made of the premises in dispute at a time prior to his having become administrator.

Notice to be given as administrator not effectually given before letters.

Where it had been agreed by articles of partnership that the executor or administrator of a deceased partner should have the option of succeeding to the share of the deceased in the partnership business and effects on giving notice within three calendar months of the decease to the surviving partners, it was held that a notice given by the administrator of the deceased partner within the three months of his death, but before taking out letters of administration, was not an effectual notice within the meaning of the indenture, for that the letters of administration had not relation back to the act of giving notice, so as to clothe him with the character of administrator at that time (*a*).

Instances of valid acts, though done before administration granted:

Yet cases may certainly be found, where the letters of administration have been held to have a relation to the death of the intestate, so as to give a validity to acts done before the letters were obtained. Thus if a man takes the goods of the intestate as executor *de son tort*, and sells them, and afterwards obtains letters of administration, it seems the sale is good by relation and the wrong is purged (*b*). So in *Whitehall v. Squire* (*c*), where an intestate had delivered to the defendant a horse to

(*y*) 1 Adol. & Ell. 49.

(*z*) *Metters v. Brown*, 1 Hurls. & C. 686.

(*a*) *Holland v. King*, 6 C. B. 727; and see *Dibbins v. Dibbins*, [1896] 2 Ch. 348; *In re Kinahan's Trusts*, [1907] 1 Ir. R. 321.

(*b*) *Kenrick v. Burgess*, Moor. 126; Godolph. Pt. 2, c. 8, s. 5, p. 99, 4th edit.; *Foster v. Bates*, 12 M. & W. 226; *Hill v. Curtis*, L. R. 1 Eq. 90, 100, *ante*, p. 187, note (*y*).

(*c*) 1 Salk. 295.

depasture, and the plaintiff, before administration granted, desired the defendant to bury the intestate decently, who thereupon buried him, and the plaintiff agreed that the defendant should keep the horse in part satisfaction of the charges; and afterwards the plaintiff took administration, and brought trover for the horse; it was held by Dolben and Eyre, Justices (Holt, C. J., *dissentiente*), that the plaintiff was bound by the agreement, and could not maintain the action. The principle, however, of this decision appears to have been, that the plaintiff, being a *particeps criminis* in the very act of which he complained, should not be permitted to recover upon it against the person with whom he colluded (*d*).

Other instances, of the relation of the letters of administration to the death of the intestate, will be found in a subsequent part of this Treatise (*e*).

But it may here be observed, that it has been lately laid down that such relation exists only in those cases where the act done is for the benefit of the estate: And accordingly, in a case where the widow of an intestate had remained in the possession of her husband's property for some time after his decease, and the intestate's son had not interfered in any way with the property, which was seized under a writ of *fi. fa.* issued against the widow, and the son afterwards took out administration, it was held that there was no evidence from which the administrator's assent to the widow's taking the property could be implied: And by Parke, B., even if there had been, the estate was not bound by it, as the act to which the assent was given did not benefit the estate (*f*).

only when
done for the
benefit of the
estate.

(*d*) *Mountford v. Gibson*, 4 East, 446, by Lord Ellenborough. In *Stewart v. Edmonds*, Sittings after Hil. Term, 1828, *coram* Abbott, C. J., the intestate had sent some plate to the defendant, a silversmith, for safe custody, and was at the same time indebted to him in a sum exceeding the value of the plate: The plaintiff, after the death of the intestate, and before he obtained letters of administration, assented to the defendant retaining the plate, in satisfaction of his debt; he afterwards took out administration, and brought trover for the plate: For the defendant, *Whitehall v. Squire* was cited; but the C. J. held that the assent was not binding upon the administrator. See further, *accord.*, *Morgan v. Thomas*, 8 Exch. 305, by Parke, B. See also *Parsons v. Mayesden*, 1 Freem. 152, where it was laid down, that if a man takes the goods of the deceased by the consent of him to whom administration is afterwards granted, this is no defence, if he is sued as executor *de son tort*. But see *Hill v. Curtis*, *ubi supra*.

(*e*) *Post*, Pt. II. Bk. I. Ch. I. As to the right, founded on mere possession, to bring actions against wrong-doers, without producing letters of administration, see *ante*, pp. 216, 217.

(*f*) *Morgan v. Thomas*, 8 Exch. 302.

Security demanded by the Ecclesiastical Court from parties possessing the assets before administration granted.

Where a question was pending in the Ecclesiastical Court, as to a party's right to a grant of letters of administration, and such party possessed himself of a portion of the goods of the deceased before he had established his title, Sir G. Lee decreed that he should give such security for the safety of the goods as the Court should approve (*g*).

(*g*) *Jones v. Yarnold*, 2 Cas. temp. Lee, 570. As to injunctions restraining intermeddling with assets before administration, see *Cassidy v. Foley*, [1904] 2 Ir. R. 427.

CHAPTER THE SECOND.

THE GRANT OF GENERAL ORIGINAL ADMINISTRATION IN
CASES OF TOTAL INTESTACY.

SECTION I.

To whom General Administration is to be granted.

IT has already appeared that the statute 31 Edw. III. st. 1, c. 11, provides, that, in cases of intestacy, "the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods" (a). The power of the Ecclesiastical Judge was a little more enlarged by the statute 21 Hen. VIII. c. 5, s. 3, which provides, that in case any person die intestate, or that the executors named in any testament refuse to prove it, the Ordinary shall grant administration, "to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the same Ordinary shall be thought good": and the same section goes on to enact, that "where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator, or person deceased, and where any person only desireth the administration, as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

Stat. 31 Edw. III. st. 1, c. 11, administration to be granted to the nearest and most lawful friends:
Stat. 21 Hen. VIII. c. 5, s. 3, to the widow or next of kin, or both at discretion.

Before, however, inquiring into the rights of the persons expressly pointed out in the above statutes, it is proper to consider the right of the husband to be the administrator of his wife. This right belongs to the husband exclusively of all other

Exclusive right of the husband to be the wife's administrator:

(a) *Ante*, p. 314.

persons (*b*), and the Ordinary has no power or election to grant it to any other (*c*). The foundation of this claim has been variously stated: By some it is said to be derived from the statute of 31 Edw. III. on the ground of the husband's being "the next and most lawful friend" of his wife (*d*): while there are other authorities, which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes (*e*). But the right, however founded, is now unquestionable; and is expressly confirmed by the statute 29 Car. II. c. 3, which enacts, that the Statute of Distributions (22 & 23 Car. II. c. 10,) "shall not extend to the estates of femes covert that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act."

29 Car. II.
c. 3:

unaltered by
Married
Women's
Property Act,
1882:

The Married Women's Property Act, 1882, has not altered the devolution of the undisposed of separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed.

Thus, where a married woman, who had a power of appointment over certain trust funds, and was also possessed of separate estate, her title to which had accrued before the Married Women's Property Act, 1882, but including also a considerable amount of savings of the income of such estate accrued since the Act, died in 1887, having in the same year made a Will, by which she exercised her power of appointment over the trust fund and appointed executors, but made no disposition of her separate property, it was held that on the death of the testatrix the title of her husband to her undisposed of separate estate accrued, and that the executors

(*b*) *Humphrey v. Bullen*, 1 Atk. 459.

(*c*) *Sir George Sand's Case*, 3 Salk. 22.

(*d*) 3 Salk. 22; *Elliott v. Gurr*, 2 Phillim. 19; and it would seem that this is the right view: *Fettiplace v. Gorges*, 1 Ves. 46; *Re Lambert's Estate*, 39 C. D. 626. It is to be remembered that administration was not necessary to enable the husband to take his deceased wife's chattels or chattels real, though it was necessary to enable him to take her outstanding choses in action.

(*e*) Com. Dig. Administrator (B. 6); *Watt v. Watt*, 3 Ves. 247.

of her Will became trustees for him, and not for the next of kin of the testatrix (f).

The separate use, whether created by statute or settlement, is exhausted when the wife dies without making a disposition (g).

This right of administration to the wife is not an ecclesiastical, but a civil right of the husband, though it is a right that was administered in the Ecclesiastical Courts (h).

Though a marriage be voidable, by reason of some *canonical* disability (e.g., on account of corporal infirmities and formerly as being within the prohibited degrees of consanguinity or affinity), yet the husband is entitled to the administration of the wife, unless sentence of nullity was declared before her death (i). But where the marriage took place under one of the *civil* disabilities (such as prior marriage, want of age, idiocy, and the like, and since 5 & 6 Will. IV. c. 54, by being within the prohibited degrees of consanguinity or affinity), the contract of marriage is absolutely void *ab initio*; and consequently the husband cannot be entitled to take administration. Thus, where it appeared that the woman was of unsound mind at the time of the celebration of the marriage, the husband was refused administration of her effects, and condemned in costs (k).

where the marriage was voidable the husband is entitled to administration :

secus, where it was void.

Where a wife has been judicially separated or has obtained a protection order, under stat. 20 & 21 Vict. c. 85, s. 21 (l), or a separation order, under 58 & 59 Vict. c. 39, s. 5 (m), and afterwards dies in the lifetime of her husband, intestate, the Court will decree administration, limited to such property as she acquired since the judicial separation or order (without

Administration to wife dying after a judicial separation, protection order, or separation order.

(f) *Re Lambert's Estate*, 39 C. D. 626.

(g) *Cooper v. Macdonald*, 7 C. D. 288; *Re Lambert's Estate*, 39 C. D. 633. As to the distinction between the husband's title, *jure mariti*, to property to which his deceased wife was entitled for her separate use, and as her administrator to her separate property under the Act, see *post*, p. 529, n. (y).

(h) By Sir J. Nicholl, in *Elliott v. Gurr*, 2 Phillim. 19, 20.

(i) *Elliott v. Gurr*, 2 Phillim. 19.

(k) *Browning v. Reane*, 2 Phillim. 69. It would seem that a man convicted of bigamy, in respect of his marriage with the intestate, might, nevertheless, propound his interest as the lawful husband of the deceased, in a suit touching the administration of her effects in the Ecclesiastical Court: and might succeed in such suit on proof shown of his not having been guilty of the crime, notwithstanding his said conviction be pleaded and proved: *Wilkinson v. Gordon*, 2 Add. 152. See 1 Phillips on Evidence, 336 *et seq.*, 7th edit.

(l) See *ante*, p. 47.

(m) *In the goods of Jones*, 74 L. J. P. 27.

specifying of what that property consisted), to the next of kin of the wife; as to the remainder, administration will be granted to the husband (*n*).

Husband a bankrupt.

Upon the bankruptcy of the husband his right to administer to his wife's estate is not such a right as will vest in the trustee under his bankruptcy, but under special circumstances the Court will grant administration to the trustee under section 73 of the Probate Act, 1857 (*o*).

Husband's right unaffected by Land Transfer Act, 1897.

The Land Transfer Act, 1897, s. 2, sub-s. 4, provides that "where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of the persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin." The prior right of the husband of an intestate is not affected by that Act; and, where there is both real and personal estate, the husband is entitled to the grant in priority to the heir-at-law. Where, however, it appeared that the value of the real estate far exceeded that of the personalty, and that the husband was mismanaging part of the estate, the Court, in the special circumstances, passed over the husband, and granted administration to the guardian of the infant heir-at-law under sub-s. 4 of s. 2 of the Land Transfer Act, 1897, and s. 73 of the Court of Probate Act, 1857 (*p*).

(*n*) *In the goods of Worman*, 1 Sw. & Tr. 513. See also *In the goods of Faraday*, 2 Sw. & Tr. 369; *In the goods of Weir*, 2 Sw. & Tr. 451; *In the goods of Stephenson*, L. R. 1 P. & D. 289. It is unnecessary, generally speaking, that the husband should be cited: *In the goods of Brighton*, 34 L. J. P. & M. 55; *In the goods of Faraday*, 2 Sw. & Tr. 369. He has no right to the administration if the marriage has been dissolved on the ground of his adultery and desertion: *In the goods of Hay*, L. R. 1 P. & D. 51; 35 L. J. P. & M. 3; *In the estate of Wallas*, [1905] P. 326; and see *In the goods of Nares*, 13 P. D. 35.

(*o*) *In the goods of Turner*, 12 P. D. 18; and see *In the goods of Conolly*, 74 L. T. 461; *In the goods of Morgan*, 75 L. T. 190; *In the goods of Causton*, [1906] P. 124; *In the goods of Bouron*, 84 L. J. P. & M. 92. The headnote in the last mentioned case is not borne out by the report. It does not appear that Bargrave Deane, J., intended to lay down any principle in conflict with *In the goods of Turner* (*supra*), and the grant was in fact made under sect. 73 of the Court of Probate Act, 1857. On the renunciation of the husband of an intestate, where there is real estate, the grant will not be made to the husband's receiver in bankruptcy without clearing off the heir-at-law: Additional Instructions under the Land Transfer Act, 1897, No. 10.

(*p*) See the Land Transfer Act, 1897, s. 2 (4), Probate Rule 109 of Nov. 20, 1897, and *In the goods of Ardern*, [1898] P. 147. See also *In the goods of Roberts*, [1898] P. 149.

Where the husband has been cited to take out letters of administration to the estate of the wife, and has entered no appearance to the citation, the Court will pass him over and grant administration to the next of kin (q).

Husband passed over after citation.

Where a husband agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property, and she died intestate, leaving separate property of which she had become possessed by virtue of the deed, the Court, notwithstanding the husband objected, granted letters of administration to her father limited to that property (r).

Administration to wife living apart from husband under separation deed.

In case the wife died intestate, and afterwards the husband died without having taken out administration to her, the Ecclesiastical Court at one time considered itself bound by the statute to grant administration to the next of kin of the wife, and not to the representatives of the husband (s). But such administrator was considered in equity as a trustee for the representatives of the husband (t).

By the old practice if the husband died before he obtained administration, it was granted to the wife's next of kin :

In the case of *In the goods of Gill (u)*, Sir John Nicholl adverted to the inconvenience of this rule of granting administration to those who have no beneficial interest, and its defiance of all principles. And in a subsequent case (x) he granted administration *de bonis non* of a feme covert to the representatives of the husband, an appearance having been entered, and administration prayed by the next of kin of the wife, and observed that he should have done the same if the husband had not taken out administration, unless it could be shown that he had not the interest, but that the property belonged to the wife's next of kin: And the learned judge desired that it might be understood in the Registry that this was to be the rule for the future, unless special cause to the contrary be shown (y). And the course in the Courts now is, in all cases

but by the modern practice, it is granted to the husband's representative, unless the property belongs to the wife's next of kin :

(q) *In the goods of Moore*, [1891] P. 299.

(r) *Allen v. Humphrys*, 8 P. D. 16. See also *In the goods of Megson*, 80 L. T. 295.

(s) *Reece v. Strafford*, 1 Hagg. 347. See also the other cases reported in the Appendix to 2 Hagg. And see *post*, p. 389.

(t) *Cart v. Rees*, cited in *Squib v. Wyn*, 1 P. Wms. 381; *Humphrey v. Bullen*, 1 Atk. 458; *Re Lambert's Estate*, 39 C. D. 626, 635.

(u) 1 Hagg. 341.

(x) *Fielder v. Hanger*, 3 Hagg. 769.

(y) Administration of the effects of a former wife was refused to the representatives of a second wife who had taken out administration to her husband, the next of kin of the husband not having been cited: *In the goods of Sowerby*, 2 Curt. 852. See *In the goods of Bell*, 1 Sw. & Tr. 288. If the husband's representatives are several adminis-

where the wife has predeceased her husband, to grant to the representatives of the husband alone letters of administration to the wife (z). But if the next of kin are entitled to the beneficial interest (as by settlement), the administration is still to be decreed to them; because the principle is that the grant ought to follow the interest (a).

but husband's
next of kin
must first
constitute
themselves
his legal
personal
representa-
tives.

It must be observed, however, that the husband's next of kin must constitute themselves his legal personal representatives before they have any claim to administer to the wife's estate (b).

The case of *Gutteridge v. Stilwell* (c), in which Lord Brougham appears to have acted inconsistently with this doctrine, must be considered overruled (d).

Since Land
Transfer Act,
1897, as to
real estate
heir-at-law
of wife has

In the case of *In the goods of Roberts* (e) Sir F. H. Jeune held that in cases comprising real estate and coming within the operation of the Land Transfer Act, 1897, the heir-at-law of the wife had a right to the grant of administration

trators, they must all join in taking out the administration to the wife; for it is not the practice to make a subsequent grant to one alone of co-administrators: *In the goods of Nayler*, 2 Robert. 409; unless in special circumstances, or after renunciation or citation of the others: *Hancock v. Lightfoot*, 3 Sw. & Tr. 557. *Secus* as to co-executors: *In the goods of Nayler* (supra).

(z) Per Lord Hatherley in *Partington v. Att.-Gen.*, L. R. 4 H. L. 100, 109.

(a) *In the goods of Pountney*, 4 Hagg. 289. Where a daughter was entitled to a legacy under her father's Will, and both she and her husband (who survived her) died in the lifetime of her father, leaving issue, it was held that administration limited to the legacy might be granted to the daughter's next of kin without citing the husband's representative; for the legacy had been saved from lapsing by sect. 33 of the Wills Act, 1837, which provided that in such circumstances the legatee must be regarded as having died immediately after the testator, and, had that been the case, she would have died a widow and her next of kin would be entitled to administration: *In the goods of Counsell*, L. R. 2 P. & D. 314.

(b) *In the goods of Crause*, 1 Sw. & Tr. 146; *Att.-Gen. v. Partington*, 3 Hurlst. & C. 193, 206; L. R. 4 H. L. 100; *In the goods of Harding*, L. R. 2 P. & D. 394. See *post*, Pt. II. Bk. III. Ch. I. § III.

(c) 1 M. & K. 486.

(d) *Partington v. Att.-Gen.*, L. R. 4 H. L. 100. See also *Loy v. Duckett*, 1 Cr. & Ph. 312. His lordship there said that Sir J. Leach's view was more correct than Lord Brougham's, because it would follow from Lord Brougham's that even where an executor had assented to a legacy he might still sue for the fund out of which the legacy was to be paid on the strength of his legal title without making the legatee a party, which would in fact be administering the fund in the absence of the owner. See also *Pennington v. Buckley*, 6 Hare, 459, by Wigram, V.-C.

(e) [1898] P. 149.

in priority to the personal representative of the husband, and that the personal representative of the husband was not entitled to a general grant until the heir had been cited. He thought, however, that although theretofore grants *ad colligendum* had been applicable to personal estate only, they might, by virtue of the Land Transfer Act, 1897, and the rule made under it of the 20th November, 1897, be made applicable to real estate. He therefore granted letters of administration to the personal representative of the husband limited *ad colligendum* till the heir-at-law, who was unknown, could be cited, with liberty to let the real estate and to sell the farming stock and implements of husbandry belonging thereto.

prior right to the grant to the personal representative of the husband:

personal representative of husband may obtain grant *ad colligendum* till heir can be cited.

If the husband's representatives renounce, or fail to appear to a citation to accept administration, the grant will be made to the wife's next of kin (*f*).

Grant after citation of husband's representatives.

It appears to have been ruled in the Prerogative Court, that where the husband and wife are drowned in the same ship, they must be presumed to have perished at the same moment unless proof can be obtained as to the exact time of the death of either (*g*). At all events in such cases, in order to entitle the husband to the wife's property, it must be proved that he survived her; and consequently the administration thereof must be granted to her next of kin, if his representative cannot give any such proof (*h*).

Husband and wife drowned in the same ship.

It has already appeared that in several cases, even before the Married Women's Property Act, 1882, a feme covert might make a Will. It remains to be considered to what extent her Will operates as a bar to the husband's right to be her administrator.

In what cases the Will of the wife might control the husband's right to administer:

Prior to the Married Women's Property Act, 1882, the husband's right was wholly or partially barred according to the extent of the power, or the husband's agreement, as the case might be.

law prior to Married Women's Property Act:

Since the passing of the Married Women's Property Act, 1882, the prior authorities have become of little moment

law since Married Women's Property Act:

(*f*) *In the goods of Bell*, 1 Sw. & Tr. 288.

(*g*) *In the goods of Selwyn*, 3 Hagg. 784; 1 Curt. 705. But see *Underwood v. Wing*, 4 De G. M. & G. 633. See *post*, Pt. III. Bk. III. Ch. II. § v., where this subject is more fully considered.

(*h*) *Satterthwaite v. Powell*, 1 Curt. 705; *In the goods of Wheeler*, 31 L. J. P. M. & A. 40; *In the goods of Alston*, [1892] P. 142; *In the goods of Benyon*, [1901] P. 141; *In the estate of Bruce*, 26 T. L. R. 381. See, as to the modern practice, *In the goods of Roby*, [1913] P. 6. See *post*, Pt. I. Bk. V. Ch. III. § 1. p. 379.

except as to cases excluded from or not falling within the operation of that Act (*i*). In cases coming within the operation of the Act a married woman can appoint anyone she pleases executor of her Will, and exclude her husband's right to be her administrator; and a grant of Probate of the Will of a married woman is now unlimited, and there is, generally speaking, no *cæterorum* grant (*k*).

administra-
tion where
wife is
executrix of
another.

If the wife be executrix to another, and dies intestate, then, as to the goods which she had in that capacity, administration must not be granted, generally speaking, to her husband. In fact, in this case, the administration is not of the goods of the wife, but *de bonis non* of her testator, *cum testamento annexo* (*l*). Consequently, the administration must be granted according to the rules established with respect to that species of grant, which will be explained in the subsequent chapter.

Of the right
of the widow:
The Ordinary
may grant ad-
ministration
to her or next
of kin, or to
them jointly:

As to the right of the widow; the stat. 21 Hen. VIII. c. 5, s. 3, directs that the Ordinary shall grant administration "to the widow or the next of kin or to both" at his discretion (*m*). Therefore, where it was moved for a mandamus to the official of the Bishop of Gloucester to commit administration to the widow of an intestate, the Court refused the motion, saying, that it would be to deprive the Ordinary of his election in granting it to her, or the next of kin (*n*). And now in cases where the assets include real estate and coming within the operation of the Land Transfer Act, 1897, by virtue of section 2 (4) and Probate Rule of 20th Nov., 1897, the heir-at-law is declared to be equally entitled with the next of kin to the grant, and it would seem therefore that in such cases the above-mentioned

since Land
Transfer Act,
1897, where
assets include
real estate,
heir-at-law
equally en-
titled with
next of kin:

(*i*) For those cases see Williams Exors. 8th edit. pp. 420 and 421.

(*k*) See *ante*, p. 297.

(*l*) *Smith v. Jones*, Bulstr. 45; *Jones v. Roe*, W. Jones, 176; *Anon.*, 3 Salk. 21.

(*m*) Sir C. Cresswell in the case of *In the goods of Browning*, 2 Sw. & Tr. 634, held that the Court is precluded by this statute from making a joint grant to a widow and one of the persons entitled in distribution (but not next of kin), even with the consent of the next of kin, and of all the other persons entitled in distribution, and that the 73rd section of the Court of Probate Act, 1857 (see *post*, pp. 360, 361), did not, under the circumstances of the case, enable him to do so. In a later case, Sir J. P. Wilde held that the Court had power under sect. 73 of the Probate Act, 1857, to make a joint grant of administration to the next of kin, and to a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient: *In the goods of Grundy*, L. R. 1 P. & D. 459.

(*n*) *Anon.*, 1 Stra. 525.

discretion of the judge extends to the heir as well as to the widow and the next of kin (o).

The statute further directs the Ordinary, in his discretion, to grant administration to *both* the widow and the next of kin;— and it has been held that the grant may be to them both jointly, or both separately, by committing several administrations of several parts of the goods of the intestate (p). Thus in a case where a man died intestate, leaving a wife and brother, the Ordinary granted the administration of some particular debts to the brother, and of the residue to the wife: And a mandamus was moved for, to grant administration to the wife: But by the Court: The Ordinary may grant administration to the brother as to part, and to the wife for the rest; in which case neither can complain, since the Ordinary need not have granted any part of the administration to the party complaining: But if the intestate leave a bond of 100*l.*, the Ordinary cannot grant administration of 50*l.* to one person and 50*l.* to another, because this is an entire thing (q).

But the Court prefers a sole to a joint administration (r), and never forces a joint one; and is always accustomed to give priority to the widow to accept or refuse administration, or to show cause why it should not be granted to the next of kin; and the election of the judge is in favour of the widow, under ordinary circumstances and unless good cause to the contrary is shown (s). But the Court has always held that administra-

administra-
tion may be
granted to
them both
jointly or both
separately:

the election of
the Court is in
favour of the
widow:

widow set
aside for
good cause:

(o) As the widow is preferred to the next of kin, so will she be preferred to the heir-at-law, except, indeed, in cases where there is only real and no personal estate. In the Instructions issued under the Land Transfer Act, 1897, it is stated that “the prior right of the husband or widow of an intestate to a grant is not affected by the Act.”

(p) 1 Roll. Abr. tit. Exor. (D.) pl. 1, p. 908; 4 Burn, E. L. 361, Phillimore's edition.

(q) *Fawtry v. Fawtry*, 1 Salk. 36.

(r) *Vide post*, pp. 338, 339. Where a joint grant is made to the widow and one of the next of kin, all the other next of kin must consent that the grant shall be so made: *In the goods of Newbold*, L. R. 1 P. & D. 285. And the consent of a minor of twenty years and six months was acted upon in *In the goods of Dickinson*, [1891] P. 292. There were, however, special circumstances. *Semble*, since the Land Transfer Act, 1897, the consent of the heir-at-law is also requisite, where there is real estate; and a joint grant might be made to the widow and the heir-at-law. As to joint grants to the widow and a person entitled in distribution, *vide ante*, p. 326, note (m); and see *In the goods of Thacker*, [1900] P. 15.

(s) *Stretch v. Pynn*, 1 Cas. temp. Lee, 30; *Goddard v. Goddard*, 3 Phillim. 638. See also *Atkinson v. Barnard*, 2 Phillim. 317; *In the goods of Richards*, L. R. 2 P. & D. 216. But administration of the

tion may be granted to the next of kin, and the widow be set aside upon good cause (*t*); for instance, if she has barred herself of all interest in her husband's personal estate by her marriage settlement (*u*), or where she has eloped from her husband, or cohabited in his lifetime with another man (*x*), or has lived separate from her husband (*y*). But the circumstance of the wife having married again is no valid objection (*z*). However, if the deceased left children, one of whom, supported by the rest, applies for administration, the second marriage *might* induce the Court to prefer the child (*a*).

where widow
is a lunatic:

Where the widow is a lunatic her committee is entitled preferably, in like manner as the widow would be, unless good cause to the contrary is shown by the next of kin (*b*). If there is no committee of her estate, administration is granted to the widow's next of kin, or to the next of kin of the husband, according to circumstances (*c*), or in cases coming within the Land Transfer Act, 1897, to the heir-at-law, if he is the person principally interested (*d*).

a divorce
according to
foreign law
allowed in a
question of

Where the intestate had married a first wife in Denmark, both parties being domiciled there, from whom he was divorced by a contract of separation and other proceedings amounting to

effects of a domiciled Scotchman was granted to the brother (the next of kin of the deceased) without citing the widow, a similar grant having already been made in Scotland: *In the goods of Rogerson*, 2 Curt. 656.

(*t*) See accord., *In the goods of Anderson*, 3 Sw. & Tr. 489; *In re Bodden*, 28 L. T. N. S. 368; *In the goods of Stevens*, [1898] P. 126; *In the goods of Shirley*, 66 L. T. 590; *In the goods of Byrne*, 84 L. T. 570; *In the estate of Paine*, 33 T. L. R. 98. A strong case of unfitness must be made out: *In the goods of Cory*, 84 L. T. 270.

(*u*) *Walker v. Carless*, 2 Cas. temp. Lee, 560; and see *In the goods of Cosnahan*, L. R. 1 P. & D. 183.

(*x*) *Fleming v. Pelham*, 3 Hagg. 217, note (*b*); *Conyers v. Kitson*, 3 Hagg. 556; and see the cases cited *supra*, note (*t*). It should be noticed that where an application is made for a grant of administration to a person other than the widow on the ground of the widow's marital misconduct, the Court will require the widow to be cited: *In the goods of Middleton*, 14 P. D. 23; unless her guilt has been judicially established: *In the estate of Frost*, [1905] P. 140; or is beyond dispute: *In the goods of Stevens*, [1898] P. 126.

(*y*) *Lambell v. Lambell*, 3 Hagg. 568. See *Chappell v. Chappell*, 3 Curt. 429.

(*z*) *Webb v. Needham*, 1 Add. 494.

(*a*) *Ibid.* 496.

(*b*) *Alford v. Alford*, Dea. & Sw. 322; but see *In the goods of Jameson*, 46 J. P. 40.

(*c*) *In the goods of Williams*, 3 Hagg. 217; *In the goods of Dunn*, 5 Notes of Cas. 97.

(*d*) Cf. *ante*, p. 322, note (*p*).

a divorce *a vinculo matrimonii* according to the Danish law, and then married a second wife; such second wife was allowed by the Prerogative Court to take out administration to the husband (e). granting administration to a second wife.

If a wife has been divorced *a mensa et thoro*, for adultery on her part, she forfeits, it would seem, her right to the administration (f). Wife divorced *a mensa et thoro*.

Where the widow of an intestate has survived him, but dies without taking the administration, the next of kin of the intestate are, speaking generally, entitled to the grant in priority to the widow's representative; but they may be passed over without citation and the grant may be made to the widow's representative in cases where the widow has become entitled to the whole of the intestate's estate by virtue of the Intestates Estates Act, 1890 (g). Representative of the widow.

It now becomes necessary to inquire, who are the "next and most lawful friends," and the "next of kin," entitled to the grant of the administration under the statutes. Of the right of the next of kin :

Lord Coke describes them to be "the next of blood who are not attainted of treason, felony, or have any other lawful disability" (h). Who are the next of kin entitled to administration under the statutes.

It may here be observed, that it is a settled principle, established by the Ecclesiastical Court, and followed by the Probate Court, that the right to the administration of the effects of an Right to administration follows the

(e) *Ryan v. Ryan*, 2 Phillim. 322; and see *Argent v. Argent*, 4 Sw. & Tr. 52.

(f) *Pettifer v. James*, Bunbury, 16; *In the goods of Davies*, 2 Curt. 628, where Sir H. Jenner in his judgment said: "Although this Court has a discretion granted by the statute, the practice, which is the law of the Court, is to consider the widow as entitled to the administration in the first instance, and although divorced *a mensa et thoro*, she is the widow still. But where she has been divorced from her husband for adultery on her part, I think the case is a proper one for the discretion of the Court." Now by sect. 16 of 20 & 21 Vict. c. 85, a judicial separation is substituted for divorce *a mensa et thoro*; but it would seem that similar principles apply. See *In the goods of Ihler*, L. R. 3 P. & D. 50. As a wife divorced *a vinculo matrimonii* has forfeited all interest in the estate of the deceased former husband, there is no necessity for citing her before granting administration to the next of kin. See *In the goods of Nares*, 13 P. D. 35; *In the goods of Wallas*, [1905] P. 326. But the Court will not, at any rate without notice, pass over the widow who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate: *In the goods of Ihler*, *ubi supra*.

(g) 53 & 54 Vict. c. 29, *vide post*, p. 344. And see *In the goods of Bryant*, [1896] P. 159; *In the goods of Green*, 84 L. T. 61.

(h) *Hensloe's Case*, 9 Co. 39, b.

right to the property.

intestate follows the right to the property in them, or, in other words, the principle is that the grant ought to follow the interest (*i*). Whence it seems to follow, that the cases which have decided what persons are next of kin, so as to be entitled to a share of the intestate's personal estate under the Statutes of Distribution, are authorities upon the question, as to what parties are next of kin, so as to be entitled to administration under the Statutes of Administration.

Construction of Statute of Distribution by modern cases according to rules of civil law.

It has been laid down, that the Statute of Distribution must be construed according to the common law (*k*). Nevertheless, the more modern cases seem to have fully established that the construction, as to the proximity of degrees of kindred at least, is to be according to the rules of the civil law (*l*).

Definition of consanguinity.

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descenditum*," the connection or relation of persons descended from the same stock or common ancestor (*m*). The consanguinity is either lineal or collateral.

Lineal consanguinity.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between the Propositus and his father, grandfather, great-grandfather, and so upwards in the direct ascending line, or between the Propositus and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: The father of the Propositus is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line; and therefore universally obtains, as well in the civil and canon, as in the common law. This lineal consanguinity, it may be observed, falls strictly within the definition of *vinculum personarum ab eodem stipite descenditum*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor (*n*).

(*i*) By Sir John Nicholl, *In the goods of Gill*, 1 Hagg. 342, *ante*, p. 323. And see *post*, p. 348.

(*k*) *Blackborough v. Davis*, 1 P. Wms. 50.

(*l*) *Lock v. Lake*, 2 Cas. temp. Lee, 420; 4 Burn, E. L. 543, Philimore's edition.

(*m*) 2 Black. Comm. 203.

(*n*) *Ibid*.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such, then, as literally spring from one and the same ancestor who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issue are lineally descended from John Stiles as their common ancestor: and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos* (*o*).

Collateral
consan-
guinity

It must be carefully remembered, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus Titius and his brother are related; why? because both are derived from one father: Titius and his first cousin are related; why? because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this: that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by Holy Writ, that there is one couple of ancestors belonging to us all from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other (*p*).

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin, so as to be entitled to administration, conforms, as it has been above observed, to that of the civil law, and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending (*q*); or, in other words, to take the sum of the degrees in both lines to the common ancestor (*r*).

Mode of
calculating
degrees of
consan-
guinity in
the collateral
line.

(*o*) 2 Black. Comm. 204.

(*p*) *Ibid.* 205.

(*q*) *Ibid.* 207; Toller, 88.

(*r*) *Ibid.* and Mr. Christian's note to 2 Black. 207. According to the canon law, the mode of computation is to begin at the common ancestor, and reckon downwards, and in whatsoever degree the two persons, or the more remote of them, is distant from the common

The Propositus and his cousin-german are related in the fourth degree—because, following the rule of computation, from the Propositus ascending to his father is one degree: from him to the common ancestor, the grandfather, two: then, descending from the grandfather to the uncle, three: and from the uncle to the cousin-german, four. Again, the second cousin of the Propositus is related in the sixth degree; because, from the Propositus, ascending to his father is one degree; from his father to his grandfather, two; from his grandfather to his great-grandfather, the common ancestor, three; then, descending, from the great-grandfather to the great-uncle of the Propositus, four; from the great-uncle to the great-uncle's son, five; from his great-uncle's son to his second cousin, six.—It will be observed, that kindred are found distant from the Propositus by an equal number of degrees, although they are relations to him of very different denominations. Thus, a grand-daughter of the sister, and a daughter of the intestate's aunt (*i.e.*, a great-niece and a first cousin), are in equal degree, being each four degrees removed (*s*).

In the further consideration of this mode of computing proximity of kindred, and the rights to administration derived from it, several remarkable distinctions may be observed, with reference to the corresponding rules of the common law, respecting succession to inheritances.

Relations by
mother's side
equally
entitled with
those of
father's.

1st. Relations by the father's side and the mother's side are in equal degree of kindred; and, therefore, equally entitled to administration: for, in this respect, dignity of blood gives no preference (*t*). Hence it may happen that relations are distant from the intestate by an equal number of degrees, and equally entitled to the administration of his effects, who are no relations at all to each other.

Half blood
not excluded.

2ndly. The half blood is admitted to administration as well as the whole (*u*); for they are kindred of the intestate, and had formerly been excluded from the inheritance of land only for

ancestor, that is the degree in which they are related to each other. It is obvious, that the degrees by this calculation are fewer than by the mode of the civilians.

(*s*) *Thomas v. Ketteriche*, 1 Ves. sen. 333; *Thirt v. Robinson*, cited Ambl. 192. So a first cousin twice removed is in the same degree as a second cousin; for they are both in the sixth degree of consanguinity: *Silcox v. Bell*, 1 Sim. & Stu. 301; *Lock v. Lake*, 2 Cas. temp. Lee, 421.

(*t*) *Moor v. Barham*, cited in *Blackborough v. Davis*, 1 P. Wms. 53.

(*u*) *Smith v. Tracey*, 1 Vent. 323.

feudal reasons: therefore, the brother of the half blood shall exclude the uncle of the whole blood (*w*); and the Ordinary *may* grant administration to the sister of the half or the brother of the whole blood, at his discretion (*x*).

3rdly. As younger children must stand in the same degree of kindred as the eldest, primogeniture can give no *right* to preference in the grant of administration (*y*).

Primogeni-
ture gives
no *right* to
preference.

4thly. The right to administration will follow the proximity of kindred, though ascendant: and, therefore, when a child dies intestate, without wife or child, leaving a father, the father is entitled to the administration of the personal effects of the intestate as next of kin, exclusive of all others (*z*). Indeed, anciently, that is, in the reign of Henry I., a surviving father could have taken even the real estate of his deceased child (*a*). But this law of succession was altered soon afterwards; for we find by Glanville, that in the time of King Henry II. the father could not take the real estate of his deceased child, the inheritance being then carried over to the collateral line: and it was subsequently (prior to the passing of the Act for the amendment of the Law of Inheritance, 3 & 4 Will. IV. c. 106) held an inviolable maxim, that an inheritance could not ascend: But this alteration of the law never extended to personal estate (*b*).

The rights of
ascendants

of the father :

So with respect to the mother, if a child dies intestate without a wife, child, or father, the mother is entitled to administration (*c*): and before the statute of 1 Jac. II. c. 17, she could claim as next of kin the whole personal estate; but by that statute, every brother and sister shall have an equal share with her (*d*). Again, if a man dies intestate, leaving no nearer relations than a grandfather or grandmother, and an uncle or aunt, the grandfather or grandmother, being in the second degree, though ascendant, will be entitled to administration to the exclusion of the uncle or aunt, who are related only in the

of the mother:

grandfather
preferred to
the uncle.

(*w*) *Collingwood v. Pace*, 1 Ventr. 424.

(*x*) *Brown v. Wood*, Aley, 36; 2 Black. Comm. 505. But see *post*, p. 337.

(*y*) *Warwick v. Greville*, 1 Phillim. 124. But see *post*, p. 338.

(*z*) *Ratcliffe's Case*, 3 Co. 40, *a*.

(*a*) *Blackborough v. Davis*, 1 P. Wms. 50.

(*b*) 1 P. Wms. 51. And now, by stat. 3 & 4 Will. IV. c. 106, s. 6, every lineal ancestor shall be capable of being heir to any of his issue.

(*c*) *Ratcliffe's Case*, 3 Co. 40, *a*, where the well-known case the *Duchess of Suffolk*, Bro. Admor. pl. 47, was denied.

(*d*) See *post*, Pt. III. Bk. IV. Ch. I. § IV.

third degree (*e*). So a great-grandmother is equally entitled with an aunt (*f*).

However, though the Ecclesiastical Law of England acknowledges the rights of ascendants generally, yet it does not recognise them to the extent of the civil law, according to which, ascendants, of whatever degree, shall be preferred before all collaterals, except in the case of brothers and sisters. But our law prefers the next of kin, though collateral, before one who, though lineal, is more remote (*g*).

Females
equally en-
titled with
males, at the
discretion of
the Court.

5thly. With respect to the right to administration, those in equal degree are equally entitled, subject to the discretionary election of the Court, whether males or females (*h*). The preference of males to females, which exists in the succession to inheritances, seems to have arisen entirely from the feudal law; and has never been applied to rights respecting personal estate (*i*).

Exceptions in
our law to
the rules of
proximity of
blood:

Children of
intestate pre-
ferred to his
parents:

Brother to
grandfather.

It remains to notice certain exceptions to the rule of computation, above stated, of the proximity of kindred and consequent right to administration.

1st. The parents of an intestate are as near akin to him as his children; for they are both in the first degree: but in our law children are allowed the preference (*k*), and so are their lineal descendants to the remotest degree (*l*).

2nd. Where the nearest relations, according to the above computation, are a grandfather or grandmother, and brothers or sisters of the intestate, although these are all related in the second degree, yet the latter are entitled to the administration to the exclusion of the former (*m*).

Recapitula-
tion.

To recapitulate, in the first place the children, and their lineal descendants to the remotest degree: and on failure of children, the parents of the deceased are entitled to the adminis-

(*e*) *Mentney v. Petty*, Prec. Chanc. 593; *Blackborough v. Davis*, 1 P. Wms. 41.

(*f*) *Burton v. Sharp*, cited in 1 Lord Raym. 686; Lutw. 1055.

(*g*) 1 P. Wms. 51, by Lord Holt; *Stanley v. Stanley*, 1 Atk. 458, by Lord Hardwicke.

(*h*) *Brown v. Wood*, Aleyn, 36; *S. C.*, Style, 74.

(*i*) But see *post*, p. 338.

(*k*) 2 Black. Comm. 504. But by this preference it is not to be understood that they are not considered as perfectly equal in degree of proximity: *Withy v. Mangles*, 4 Beav. 358; *S. C.*, in Dom. Proc. 10 Cl. & Fin. 215.

(*l*) *Carter v. Crawley*, Sir T. Raym. 500; *Evelyn v. Evelyn*, Amb. 192.

(*m*) *Evelyn v. Evelyn*, 3 Atk. 762.

tration: then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins (*n*). A more particular discussion of some parts of the present subject will be found in a subsequent part of this Treatise, where the rights of the next of kin of an intestate, under the Statute of Distributions, are considered (*o*).

If the sole next of kin is a married woman, and renounces, the grant is made to the husband:—for he has an interest, and the grant must follow the interest, and the wife cannot, by renouncing, deprive her husband of his right to the grant (*p*). This principle would not, however, seem to apply where by reason of the Married Women's Property Acts the wife is absolutely entitled to the property as her separate property as if she were a feme sole, for in that case the husband had no interest; but if the wife, sole next of kin, died intestate, her husband's right would revive.

Right of husband of next of kin who renounces.

It must be borne in mind that as regards intestates who die after the coming into operation of the Land Transfer Act, 1897, the heir-at-law, where there is real estate, is put on an equal footing with the next of kin as regards the right to a grant of administration (*q*).

Right of heir-at-law equal to that of next of kin, under Land Transfer Act, 1897, where there is real estate.

Although the next of kin and heir-at-law are equally entitled to a grant, yet in the case of the renunciation of the husband of an intestate, the heir-at-law must renounce or be cited before a grant is made to the next of kin. But on the renunciation of the widow of an intestate, it is not necessary that the heir-at-law should renounce or be cited before a grant is made to the next of kin (*r*).

On the renunciation of the husband of an intestate a grant will not be made to the husband's receiver in bankruptcy without clearing off the heir-at-law. Nor will a grant be made to a person who (though not one of the next of kin) is entitled on distribution to the personal estate, or to the representative of a next of kin of the intestate, without clearing off the heir-at-law (*r*).

(*n*) 2 Black. Comm. 505.

(*o*) *Post*, Pt. III. Bk. IV. Ch. I. § IV.

(*p*) *Haynes v. Matthews* (1859), 1 Sw. & Tr. 460; *Wenham v. Wenham* (1848), 6 Notes of Cas. 17.

(*q*) Land Transfer Act, 1897, s. 2 (4); Probate Rule 109, Nov. 20th, 1897.

(*r*) Additional Instructions to the officers of the Principal Probate

Where the title of the person applying for administration as heir-at-law is clear and there is no personal estate, a grant may be made to the applicant without notice to the next of kin; but where the title of the applicant is doubtful, or the amount of the personalty large as compared with the realty, notice should be given to the next of kin (*s*). But in special circumstances, where the heir-at-law was abroad and his address unknown, the Court granted administration under s. 73 of the Court of Probate Act, 1857, to one of the next of kin, without requiring citation of or notice to the heir-at-law (*t*).

Parties contesting the right to administration before any grant.

According to the former practice, where two parties contested the right to administration before any grant had been made, both were to propound their interests, and to proceed *pari passu*: and this whether the mutual interests were denied, or whether an interest was denied and a Will opposed: nor did the rule vary, whether the asserted next of kin were in the same or different degrees of relationship (*u*). In *Waller v. Heseltine* (*v*), the Prerogative Court decided that the question concerning a Will and the question of interest between the Crown and the next of kin, must all go on together.

But actions are no longer brought to determine the title of rival claimants to a grant except in cases where questions of legitimacy or pedigree are in issue. By the present practice, where several persons, all equally entitled to a grant, contend *inter se* for administration, the question of their relative fitness is decided by a registrar on summons. And where the Court is asked, under special circumstances, to pass over a person having admittedly a superior legal right to the grant, the application is made to the Court on motion under sect. 73 of the Court of Probate Act, 1857.

Where there are several next of kin in equal degree:

Where there are several persons standing in the same degree of kindred to the intestate, the statute, we have seen, gives the Ordinary his election to accept any one or more

Registry and District Probate Registries under the Land Transfer Act, 1897.

- (*s*) *In the goods of Barnett*, [1898] P. 145.
- (*t*) *In the goods of Blenkinsopp*, 49 W. R. 336.
- (*u*) *Dabbs v. Chisman*, 1 Phillim. 159. It is otherwise when a party is in the possession of the administration: *post*, pp. 339, 356. See also *post*, p. 352, note (*y*).
- (*v*) Cited by Sir John Nicholl in 1 Phillim. 159; reported 1 Phillim. 170.

of such persons (*w*). It remains to inquire by what principles and rules of practice his discretion, in making such election, was guided in the Ecclesiastical Court.

The Court considered it its first duty to place the administration in the hands of that person who was likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution: the primary object being the interest of the estate (*x*). But where there is no material objection on one hand, or reasons for preference on the other, the Court, in its discretion, puts the administration into the hands of that person, amongst those of the same degree of kindred, to whom the majority of parties interested are desirous of entrusting the estate (*y*). On this principle, in a case as early as 1678 (*z*), it was decided by the two Chief Justices, the Chief Baron *et aliis*, that, where the deceased left four grandchildren, whereof one was of age and the other three minors, the administration should be granted to the mother as guardian to the three *durante minore ætate*, in preference to the grandchild who was of age: because, since the Statute of Distribution (22 & 23 Car. II. c. 10), which entitled them all to distribution, the interest of the three preponderated.

the Court grants administration to him whom the majority of parties interested desire :

But, although, when the contest for an administration is between two persons in equal degree of the whole blood, the general rule has been to grant it to that person in whom the majority of those entitled to distribution concur; yet that rule does not hold when the contest is between one of the whole blood and one of the half blood; for, in that case, the whole blood is preferable in the grant of administration to the half blood, though the majority of interests concur in the

whole blood preferred, unless material objections can be proved.

(*w*) By Rule 28, P. R. 1862 (Non-contentious): "Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin." It is not the practice to require such proof of notice except in special circumstances.

(*x*) *Warwick v. Greville*, 1 Phillim. 125.

(*y*) *Elwes v. Elwes*, 2 Cas. temp. Lee, 573; *Budd v. Silver*, 2 Phillim. 115. However, administration is not always granted to the majority of interests: *Wetdrill v. Wright*, 2 Phillim. 248. See also *In the goods of Stainton*, L. R. 2 P. & D. 212.

(*z*) *Cartwright's Case*, 1 Freem. 258. See also *Sawbridge v. Hill*, L. R. 2 P. & D. 219.

latter, unless material objections can be proved against him of the whole blood (*a*).

Primogeniture.

Primogeniture, as it has been already observed, gives no right to preference, so as to weigh against the wish of the majority of interests; yet if things are precisely equal, if the scale is exactly poised, being the elder brother would incline the balance (*b*).

Son preferred to daughter.

Again, by the practice of the Court, a son has the preference to a daughter, unless there are material objections to him; and it has been held not enough to divest him of that preference, to show that he has intermeddled with the effects of the deceased without competent authority (*c*).

A man used to business preferred:

Cæteris paribus, a man accustomed to business is preferred by the Court to be administrator (*d*).

Prior petens:

Where none of these considerations applies, the grant will be made to the person who first applied for administration (*e*).

next of kin also creditor:

The fact of one of several next of kin being also a creditor is rather adverse to, than in favour of, his being preferred in a contest for the administration (*f*).

next of kin a bankrupt:

In a case where the administration was contested between two in an equal degree of relationship, one of whom was unobjectionable, but the other had been twice a bankrupt, the Court granted the administration to the former, and condemned the latter in costs (*g*).

next of kin a lunatic.

Where the sole next of kin of an intestate was a lunatic, and her committee renounced, the Court upon the consent of the next of kin of the lunatic being filed, granted administration to a stranger in blood (*h*).

The Court prefers a sole

The Court prefers, *cæteris paribus*, a sole to a joint adminis-

(*a*) *Mercer v. Moorland*, 2 Cas. temp. Lee, 499; *Stratton v. Linton*, 31 L. J. P. M. & A. 48.

(*b*) *Warwick v. Greville*, 1 Phillim. 125; *S. P.* as to an elder of two sisters, *Coppin v. Dillon*, 4 Hagg. 376.

(*c*) *Chittenden v. Knight*, 2 Cas. temp. Lee, 559. The rule that males are to be preferred to females is not so stringent as the rule that the grant will follow the majority of interests: *Iredale v. Ford*, 1 Sw. & Tr. 305. Again, the former rule may be met by another rule, viz., that the grant will be made *priori petenti*: *Cordeux v. Trasler*, 34 L. J. P. M. & A. 127; 4 Sw. & Tr. 48.

(*d*) *Williams v. Wilkins*, 2 Phillim. 100.

(*e*) *Cordeux v. Trasler*, 4 Sw. & Tr. 48.

(*f*) *Webb v. Needham*, 1 Add. 494. And see *Budd v. Silver*, 2 Phillim. 115.

(*g*) *Bell v. Timiswood*, 2 Phillim. 22; *Iredale v. Ford*, 1 Sw. & Tr. 305.

(*h*) *In the goods of Hastings*, 4 P. D. 73.

tration, because it is much better for the estate, and more convenient for the claimants on it (*i*); and, *à fortiori*, the Court never forces a joint administration upon unwilling parties (*j*). Joint administrations are, however, granted where all parties consent (*k*), but, generally speaking, the Court will not grant administration to more than three, except in the case of testamentary guardians (*l*).

When administration has been once committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant; unlike the case of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "*qui prior est tempore potior est jure*," applies in the former but not in the latter instance (*m*). But a next of kin—and even though he had formerly renounced administration—may, upon the death of the party appointed administrator, by leave of the Court, retract his renunciation and take administration *de bonis non* (*n*).

Where a person entitled to administration is resident in a foreign country, the Court will expect that due diligence shall be used to give him notice of the application, before it will grant administration to another party (*o*).

If the intestate left personal property, as well in the Colonies as in this country, the grant of administration obtained here will not extend to the Colonies, though the intestate died and was resident here. But the *rights* of such an administrator will extend to the property there if the deceased was domiciled here:

(*i*) *Warwick v. Greville*, 1 Phillim. 126; *Stanley v. Bernes*, 1 Hagg. 222; *In the goods of Nayler*, 2 Robert. 409; *ante*, p. 323, note (*y*).

(*j*) *Bell v. Timiswood*, 2 Phillim. 22; *In the goods of Newbold*, L. R. 1 P. & D. 285; *In the goods of Dickinson*, [1891] P. 292.

(*k*) See *Dampier v. Colson*, 2 Phillim. at p. 55; *Leggat v. Leggat*, 1 Cas. temp. Lee, 348; *Coe v. Hume*, 4 Hagg. 398. If the assets include real estate a joint grant may be made, since the Land Transfer Act, 1897, to the next of kin and heir-at-law. As to joint grants to the next of kin and a person interested in distribution, see *In the goods of Richardson*, L. R. 2 P. & D. 230; *In the goods of Walsh*, [1892] P. 230. And see *In the goods of Grundy*, L. R. 1 P. & D. 459; *In the goods of Thacker*, [1900] P. 15.

(*l*) *In the goods of Blakelock*, 1 Hagg. 682.

(*m*) Toller, 98.

(*n*) *Skeffington v. White*, 1 Hagg. 700, 702, 703; and cf. *post*, p. 356.

(*o*) *Goddard v. Cressonier*, 3 Phillim. 637; *Miller v. Washington*, 3 Hagg. 277. As to the present practice of service of citations, see *post*, p. 354.

to a joint administration: and never forces a joint administration.

When an administrator is once appointed, another of same degree of kindred cannot come into the administration until the administrator is dead.

Where a party entitled to administration is resident abroad.

Administration of property out of this country.

and the judge of probate in the Colonies ought to follow the English grant (*p*).

Administra-
tion of the
effects of a
foreigner.

In the case of a foreigner dying intestate within the British dominions, it would seem, that if no question is raised, the Court will grant administration to the person entitled to the effects of the deceased, according to the law of his own country (*q*). If the title to the effects be disputed, the question will depend on the fact whether the deceased was domiciled within the British dominions, or only a temporary resident there (*r*).

Administra-
tion to a
person domi-
ciled out of
this country
of property;
here.

If the intestate was domiciled in a foreign country, or within the king's dominions out of England, and left assets in this country, administration must be taken out here, as well as in the country of domicile (*s*). But if he left no assets in this country, the Court of Probate has no jurisdiction to make any grant of administration in respect of his estate (*t*). If the party applying for administration here has already obtained a grant in the proper Court of the country where the domicile was, it

(*p*) *Burn v. Cole*, Ambl. 416; *Atkins v. Smith*, 2 Atk. 63, by Lord Hardwicke. See *ante*, p. 268.

(*q*) *In the goods of Beggia*, 1 Add. 340; *In the goods of the Countess Da Cunha*, 1 Hagg. 237; *In the goods of Earl*, L. R. 1 P. & D. 450. Administration of the effects of a deceased, who died domiciled in Scotland, was granted to a party entitled to them according to the Scotch law, on proof of the law by affidavit from a Scotch solicitor: *In the goods of Stewart*, 1 Curt. 904. See also *In the goods of Hill*, L. R. 2 P. & D. 89; *Irwin v. Caruth*, [1916] P. 23. As to proof of foreign law, see *In the goods of Dormoy*, 3 Hagg. 767; and *ante*, p. 273.

(*r*) 1 Add. 342. And see *ante*, p. 269 *et seq.*, and *post*, Pt. III. Bk. iv. Ch. i. § v. Where a party applies for administration, as the agent of a foreigner resident abroad, and entitled to administration, the application cannot be supported, without exhibiting to the Court a proper authority from the person so entitled: *In the goods of the Elector of Hesse*, 1 Hagg. 93. Administration was granted to the attorney of a reigning foreign sovereign, of the estate in this country of his deceased predecessor, the Court requiring a bond without sureties: *In the estate of the King of Siam*, 107 L. T. 589.

(*s*) See *ante*, p. 264. *Le Briton v. Le Quesne*, 2 Cas. temp. Lee, 261; *Att.-Gen. v. Bouwens*, 4 Mees. & W. 193.

(*t*) *In the goods of Tucker*, 3 Sw. & Tr. 585; *Evans v. Burrell*, 28 L. J. P. & M. 82; *In the goods of Fittock*, 32 L. J. P. & M. 157. See also *In the goods of Coode*, L. R. 1 P. & D. 449; *In the goods of Lord Howden*, 43 L. J. P. & M. 26. But see *In the goods of Sanders*, [1900] P. 292, where the executors of a Will, under which a legacy of 250*l.* was payable to the "personal representatives" of the testator's brother, who died intestate domiciled in one of the Australian Colonies leaving no estate in this country, insisted on the re-sealing here of a grant of letters of administration which the brother's widow had obtained in the Colony, and the Court allowed the grant to be re-sealed. See also *In the goods of Smith*, [1904] P. 114; *In the goods of Murray*, [1896] P. 65.

seems that the Court here, generally speaking, would follow that grant (*u*): But if an original administration be applied for here, in such case, whether the deceased were a British subject or an alien, since, in either event, the distribution of his movable personal property is to be regulated according to the law of the country in which he was a domiciled inhabitant at the time of his death (*x*), it appears to be a necessary consequence that the grant should be made to the person entitled to the movable personalty of the deceased according to the law of the country of his domicile (*y*).

By the Domicil Act, 1861 (24 & 25 Vict. c. 121), s. 4, "Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette, it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death, who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul or consular agent of such foreign state, within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for

Stat. 24 & 25
Vict. c. 121,
s. 4.

When subjects of foreign states shall die in her Majesty's dominions and there shall be no person to administer to their estates, the consuls of such foreign states may administer.

(*u*) See *ante*, p. 273; *Viesca v. D'Aramburu*, 2 Curt. 277; *In the goods of Rogerson*, *ibid.* 656; *In the goods of Henderson*, 2 Robert. 144; *In the estate of Levy*, [1908] P. 108. As to whether the Court will grant administration limited to the pendency of a suit in the foreign Court to a person duly appointed by that Court, see *In the goods of Morgan*, 2 Robert. 415.

(*x*) See *post*, Pt. III. Bk. iv. Ch. i. § v.; and see also *ante*, p. 268, n. (*z*).

(*y*) See *In the goods of Johnston*, 4 Hagg. 182. But see also *In the goods of Veiga*, 3 Sw. & Tr. 13. But administration of the effects of a domiciled American dying in this country, *in itinere*, limited to the purpose of paying his debts, &c., and transmitting the balance to the Treasury of the United States, was refused to the American consul, the Crown opposing the grant, though none of the next of kin appeared to show cause against it: *Aspinwall v. The Queen's Proctor*, 2 Curt. 241. See *In the goods of Wyckoff*, 3 Sw. & Tr. 20. The law of this country will not, it should seem, recognise the right of a foreign consul to take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country: 2 Curt. 247. See stat. 24 & 25 Vict. c. 121, s. 4, *supra*.

Rights and
liabilities of
foreign ad-
ministrators.

the benefit of the persons entitled thereto; but such consul, vice-consul or consular agent shall immediately apply for and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such Court shall seem fit.”

It may here be remarked, that although it is fully settled (as there will hereafter be occasion to show) (z), that the right of succession to the movable personal estate of an intestate is to be regulated by the law of the country in which he was domiciled at the time of his death, yet the administration of the estate must be in the country in which possession of it is taken and held under lawful authority. Thus, by the law of England, the person to whom administration is granted by the Court of Probate is by statute bound to administer the estate, and to pay the debts of the deceased: The letters of administration, under which he acts, direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as his goods will extend, and exhibit a full and true account of his administration: And these duties remain the same, notwithstanding the intestate may have died domiciled elsewhere.—Accordingly, in *Preston v. Lord Melville* (a), the persons named as trustees and executors in the Will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper Ecclesiastical Court there, and afterwards consented to the appointment, by the Court of Session of Scotland, of other persons as trustees and executors in place of those named in the Will, with all the powers that had been thereby given to them: These trustees so appointed raised an action in the Court of Session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability; and it was held by the House of Lords (reversing the decree of the Court of Session), that the personal estate in England must be administered there by the administratrix, by virtue of the letters of administration (b).

(z) *Post*, Pt. III. Bk. IV. Ch. I. § v.

(a) 8 Cl. & Fin. 1.

(b) See accord. per Lord Cranworth in *Enohin v. Wylie*, 10 H. of L. 19. See also Lord St. Leonards' observations on this case in *The Carron Iron Company v. Maclaren*, 5 H. of L. 456; *Stirling Maxwell v. Cartwright*, 9 C. D. 173; 11 C. D. 522; *Eames v. Hacon*, 16 C. D. 407; 18 C. D. 347; *Ewing v. Orr-Ewing*, 9 App. Cas. 34; 10 App.

Again, with respect to all the property of which the intestate died possessed in the King's dominions out of England, the administrator, under the letters granted there, has, it would seem, a right to hold it against an administrator under a grant obtained in this country. Thus in *Currie v. Bircham* (c), the widow of an officer who died intestate in India obtained letters of administration of her husband's effects in the Recorder's Court at Bombay, and remitted the proceeds of the effects in government bills to her agent in England: A creditor of the intestate took out letters of administration to him in this country, and brought an action against the widow's agent for money in his hands, part of such proceeds so remitted: It was held that the wife was entitled to all the effects of which the husband died possessed in India, by virtue of the letters of administration granted to her in that country, and that therefore no action lay against her agent at the suit of the plaintiff, under the letters he had obtained in the Prerogative Court here (d). However, in *Hervey v. Fitzpatrick* (e), it was held by Wood, V.-C., that where the foreign administrator remits a part of the assets to England to be sold and the proceeds to be carried to the account of the intestate's estate, and comes himself to this country, he may be sued in a Court of Equity here by a next of kin of the deceased, who has taken out administration here, in respect of those assets: and that the Court has a right to deal with them, and to appoint a receiver, if there is danger of their being taken out of the jurisdiction.

If a bastard, who as *nullius filius* has no kindred, or any other person having no kindred, die intestate, and without wife or child, it has formerly been holden, that the Ordinary could seize his goods, and dispose of them to pious uses; but it is now settled that the king is entitled to them as *ultimus hæres* (f), not

Administra-
tion to a
bastard, or
other person
without
kindred.

Cas. 453; and *In re Bonnefoi*, [1912] P. 233. But the principal administrator, that is to say, the administrator in the country of the domicile, is entitled to call on all limited administrators to pay over the net surplus. See *Eames v. Hacon*, *ubi sup.*; and see *post*, p. 1256, n. (n).

(c) 1 Dowl. & RyL. 35.

(d) See also *Jauncey v. Sealey*, 1 Vern. 397; Story's ConfL. of Laws, Ch. xiii. § 518; and *ante*, pp. 265, 266.

(e) Kay, 421.

(f) *Jones v. Goodchild*, 3 P. Wms. 33; *Rutherford v. Maule*, 4 Hagg. 213; *Dyke v. Walford*, 5 Moo. P. C. 434. In this last case it was held that the right of administration to the goods of a bastard, who died intestate and unmarried, in the county of Lancaster, belonged to the Queen in right of her Duchy of Lancaster, and not in right of her Crown. And see *In the goods of Best*, [1901] P. 333.

in a fiduciary character but beneficially (*g*); subject, nevertheless, to the debts of the intestate (*h*). Yet in such case it is the practice to transfer the royal claim by letters patent, or other authority, from the Crown, with a reservation, as it is said, of a tenth, or other small proportion of the property, and then the Court of course grants to such appointee the administration (*i*). It has indeed been asserted, that such letters patent are merely in the nature of a recommendation; and that though it be usual for the Court to admit such patentee, yet it is rather out of respect to the king, than strictly of right (*k*). But if the Court chose to grant administration to any other person, the right of the Crown would remain the same. The administrator, whoever he might be, would be a trustee for the Crown (*l*).

Where bastard leaves a widow but no children :

effect of Intestates Estates Act, 1890 (53 & 54 Vict. c. 29).

Where a bastard or other person having no kindred dies intestate, leaving a widow but no children, the widow is not entitled to the whole of his personal estate, but to one moiety only, and the Crown is entitled to the other (*m*). But where an intestate dies after the 1st of September, 1890, leaving a widow and no issue, the provisions of the Intestates Estates Act, 1890, apply, and the widow in the case of estates not exceeding 500*l*. in net value takes the whole, and where the net value of such real and personal estate exceeds 500*l*., she is entitled to 500*l*. in addition and without prejudice to her interest and share in the residue, in the same way as if such residue had been the whole of such intestate's real and personal estate. It has been decided that the Act applies only to cases of total intestacy (*n*).

Where bastard without relations disposes by Will of part only of his property.

Where a bastard having no relations makes a Will disposing of a part only of his or her property, the Crown has a right to a grant, save and except, or to a *caterorum* grant, but not to a general grant of administration, and the legatees have a right

(*g*) *Kane v. Reynolds*, 4 De G. M. & G. 571, by Lord Cranworth.

(*h*) *Megit v. Johnson*, 2 Dougl. 548, by Lord Mansfield.

(*i*) *Stote v. Tyndall*, 2 Cas. temp. Lee, 394.

(*k*) *Manning v. Knapp*, 1 Salk. 37.

(*l*) 5 Moo. P. C. 495. Where a case is not within the Statutes of Administration, the Court, in the exercise of its discretion, usually grants the administration to the interest. See *post*, Ch. III. § 1. p. 377. As to evidence of legitimacy, see *Wigley v. Solicitor to Treasury*, [1902] P. 233.

(*m*) *Cave v. Roberts*, 8 Sim. 214.

(*n*) *Re Twigg's Estate*, [1892] 1 Ch. 579. In this case Chitty, J., said the phrase "testamentary expenses" in sect. 6 of the Act was a slip, and means expenses of letters of administration and of administration generally. See *In re Cuffe*, [1908] 2 Ch. 500.

to a grant of administration with the Will annexed limited to the property disposed of by the Will (o).

In practice, in cases where a person dies intestate, unmarried and without kindred, administration to his personal estate is granted to the Treasury Solicitor, or, in cases where the intestate died resident in the Duchy of Lancaster or the Duchy of Cornwall, to the solicitor to the Duchy of Lancaster or Cornwall, as the case may be.

By the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 1, the Treasury Solicitor is constituted a corporation sole with certain powers and liabilities. Stat. 39 & 40
Vict. c. 18.

Where the Crown becomes entitled to the personal estate of an intestate, and the Court has power to grant administration to a nominee of the Crown, and where the Crown nominates for that purpose the Treasury Solicitor, the Court may grant administration for the use of the Crown to the Treasury Solicitor (by his official name) and his successors, or to some person nominated by the Treasury Solicitor (sect. 2). Grant of ad-
ministration
to Treasury
Solicitor.

The Treasury Solicitor may be nominated as administrator either in any particular case or class of cases, or in all cases, and such nomination may be limited as to His Majesty may seem fit, and the Treasury Solicitor may be authorised to nominate some other person to take out administration in any particular case or class of cases (*Ibid.*).

The administration, when granted to the Treasury Solicitor, and the office of administrator under such grant, and all the estate, rights, duties, and liabilities of such administrator vest in and are imposed on the Treasury Solicitor for the time being without any further grant of administration (*Ibid.*).

The Treasury Solicitor notwithstanding that he does not give the bond which, if such administration were granted to him as a private individual, he would be required by law to give, is subject as regards the administration to the liabilities and duties imposed by such bond (*Ibid.*) (p).

Section 4 deals with the disposal of money and property received under an administration or forfeiture, and of unclaimed grants. sect. 4.

Section 5 provides for the making of rules by the Treasury. sect. 5.

Section 6 applies the Act to previous administrations, &c. sect. 6.

(o) *In the goods of Rhoades*, L. R. 1 P. & D. 119.

(p) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81, *post*, p. 429.

sect. 9 (1).

Section 9 (1) provides for the re-enactment of sect. 2 of stat. 15 & 16 Vict. c. 3, viz., that "where the administration of the personal estate of any deceased person has been granted to the Solicitor for the affairs of Her Majesty's Duchy of Lancaster, for the use of Her Majesty, that solicitor shall, notwithstanding that he does not give the bond which, if such administration had been granted to him as a private individual, he would be required by law to give, be subject, as regards the administration, to the liabilities and duties imposed by such bond" (*q*).

Where a person died in Cornwall intestate without known relations, the Court granted letters of administration of his estate for the use of H.R.H. the Prince of Wales as Duke of Cornwall, but without prejudice to the rights of the Crown (*r*).

Intestates
Estate Act,
1834 (47 & 48
Vict. c. 71),
s. 2.

Recovery of
personal
estate.

By the Intestates Estates Act, 1884, "where the administration of the personal estate of any deceased person is granted to a nominee of Her Majesty (whether the Treasury Solicitor or a person nominated by the Treasury Solicitor, or any other person) any action or proceeding by or against such nominee for the recovery of the personal estate of such deceased person, or any share thereof, shall be of the same character, and be brought, instituted, and carried on in the same manner, and be subject to the same rules of law and equity (including the rules of limitation under the Statutes of Limitation or otherwise) in all respects as if the administration had been granted to such nominee as one of the next of kin of such deceased person" (sect. 2) (*s*).

sect. 3.
Limitation
of actions.

Section 3 enacts that "after the passing of this Act an information or other proceeding on the part of Her Majesty shall not be filed or instituted, and a petition of right shall not be presented in respect of the personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject."

sect. 4.
Escheat of
real estate.

Section 4 enacts that "from and after the passing of this Act, where a person dies without an heir and intestate in respect of

(*q*) See *post*, p. 429.

(*r*) *Solicitor of the Duchy of Cornwall v. Canning*, 5 P. D. 114. The nominee of the Duke of Cornwall gives the usual bond, but without sureties.

(*s*) See *A.-G. v. Köhler*, 9 H. L. C. 654; *In re Dewell*, 4 Drew. 269; *In re Gosman*, 17 Ch. D. 771.

any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditaments, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the Will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments" (t).

Section 5 gives to the Court a power of sale of the interest of the Crown in any hereditament corporeal or incorporeal, and directs that the proceeds of such sale shall be paid, invested, and disposed of in manner provided by sect. 4 of the Treasury Solicitor Act, 1876. sect. 5.
Sale of Crown
interest.

It further applied the provisions of the Trustee Act, 1852 (15 & 16 Vict. c. 55), s. 1, to such sale (u).

Section 6 gives to the Crown power to waive its right to the real estate of an intestate in certain cases. sect. 6.

Section 7 defines an intestacy for the purposes of the Act as "where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person was legal or equitable, is, owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of, such person shall be deemed to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of." sect. 7.

Section 8 applies the Act to the Duchy of Lancaster. sect. 8.

Section 9 applies the Act to Ireland. sect. 9.

In the case of a felon convict, and of a *felo de se*, the law of forfeiture being abolished by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1, administration is now no longer granted as formerly to a nominee of the Crown, but follows the ordinary course of the law of succession *ab intestato* (v). Administra-
tion to a
felon.

It should be mentioned that sect. 1 of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not bind the Crown, and accordingly it has been held where a widow had died after the coming into operation of the Act, a bastard and intestate, and entitled to both real and personal estate, that the grant to Land Trans-
fer Act, 1897,
does not bind
the Crown.

(t) Proceeds of sale of realty not effectually disposed of are within this section: *Re Wood*, [1896] 2 Ch. 596.

(u) The Trustee Act, 1852, was repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53). See now sect. 30 of the Act of 1893.

(v) See *ante*, p. 51.

the Solicitor to the Treasury should be administration of her personal estate only, as before the Act (*w*).

Next of kin excluded from the administration, when they have no interest.

It has always been considered, both in the Common Law and Spiritual Courts, that the object of the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5) is to give the management of the property to the person who has the beneficial interest in it (*x*). And the inclination has been so strong to effectuate this object, by granting the administration to the interest, that, in some instances, not only the practice of the Ecclesiastical Court, but the decisions of the Judges Delegate, have not scrupled to disregard the express words of the statute (*y*). Thus in *Bridges v. The Duke of Newcastle* (Delegates, 1712), Lord Hollis died intestate, and Bridges claimed administration as next of kin: The effects were vested by Act of Parliament in the Duke of Newcastle, to pay the debts of the deceased: The Judge of the Prerogative Court (Sir Charles Hedges), and afterwards the Delegates, held that the next of kin was excluded, on the ground that he had no interest, and granted administration to the Duke of Newcastle (*z*). So in *Young v. Pierce* (*a*), administration was refused by the Prerogative Court and the Delegates to a next of kin, on the ground that she had released all her interest, and the letters were granted to the party beneficially entitled to the personal estate (*b*). Another strong instance will be found in the next section, with respect to administration *cum testamento annexo*: in granting which, it has been established by the decisions both of common lawyers and civilians, contrary to the words of the Act, that the next of kin is to be excluded from the administration when there is a residuary legatee who desires it.

To whom grant made if the next of kin die before administration granted:

Again, the statutes of administration (31 Edw. III. c. 11, and 21 Hen. VIII. c. 5) provide that the Ordinary shall grant administration to the next of kin, or the widow, or to both: and therefore these parties have a statutory right to the administration. But the obligation of the statutes has, in several

(*w*) *In the goods of Hartley*, [1899] P. 40.

(*x*) *Wetdrill v. Wright*, 2 Phillim. 248; and see *ante*, pp. 329, 330.

(*y*) See the judgment of Lord Cottenham, in *Withy v. Mangles*, 10 Cl. & Fin. 248: accord.

(*z*) Cited by the Court in *West v. Willby*, 3 Phillim. 381.

(*a*) 1 Freem. 496.

(*b*) This was a case of administration *de bonis non*: but it will appear in a subsequent section, that, with respect to the obligation of the statute, there is no difference between an administration *de bonis non* and an original administration.

adjudged cases, as well as in practice, been considered to extend only to such persons as are next of kin *at the time of the intestate's death*; and therefore the Court is not bound to grant administration to one who is not entitled to a beneficial interest in the effects, although by the death of intermediate persons, he may have become next of kin at the time the grant is required (c). Where, therefore, all who were next of kin at the time of the intestate's death have since died, then the personal representative of such next of kin, being entitled to the beneficial interest, is also entitled to the administration, whether original or *de bonis non*. The general practice, however, is that a party having a direct interest (as, for instance, a nephew taking a share by representation with an uncle, and therefore originally entitled in distribution, though not one of the next of kin at the time of the intestate's death, and therefore having no statutory right to administration) is preferred to those entitled in a representative capacity. The matter is, however, in the discretion of the Court. Lord Penzance, then Sir J. P. Wilde, in his judgment in the case of *In the goods of Carr* (d), said: "It is clear from the argument on this case how the matter stands. There are three propositions established. The first is, that the Court is not bound by the statute to make the grant to the party entitled in distribution. The second is, that the general practice that prevails would enable the party entitled in distribution to obtain the grant on application at the registry, the right of a party originally entitled being preferred to a party having a derivative interest. The third proposition is, that the whole matter is in the discretion of the Court." In this case, the judge being of opinion that the circumstances were such as to justify the Court in departing from the general practice, the grant of administration *de bonis non* was made to the executrix of the next of kin.

But it is no defence to an action brought by such representative, as administrator to the original intestate, against a debtor to his estate, that the defendant paid the debt in question to the next of kin, who died without taking out letters of administration (e).

but payment to the next of kin is no answer to an action by his representative as administrator to the original intestate.

(c) *Savage v. Blythe*, 2 Hagg. Appendix 150; *Almes v. Almes*, *ibid.* 155; and see the observations of the learned reporter, *ibid.* p. 156; *In the goods of Kinchella*, [1894] P. 264.

(d) 1 P. & D. 291. See also *In the goods of Johnson*, 7 L. R. Ir. Ch. D. 1.

(e) *Mitchell v. Moorman*, 1 Young & Jerv. 21; *Mitchell v. Holmes*,

A next of kin cannot be compelled to take out administration, though he has intermeddled with the effects.

There is a distinction between a person appointed executor, and one entitled to the administration as next of kin, with respect to the obligatory consequences of administering the goods of the deceased: An executor, it has been shown, after an act of administration, cannot refuse to accept the executorship and take probate (*f*); but although a next of kin may have intermeddled with the effects, and made himself liable as executor *de son tort*, he cannot be compelled by the Court to take upon himself the office of administrator (*g*).

Administration granted to the attorney of the next of kin:

Administration may be granted to the attorney of all the next of kin, provided they reside out of the country; and if the effects are under twenty pounds, such administration may be granted whether they are so resident or not (*h*). By rule 32, P. R. 1862 (Non-contentious), "In the case of a person residing out of England, administration, or administration with the Will annexed, may be granted to his attorney acting under a power of attorney." But where a person solely entitled to the grant is resident in this country, and able to take it himself, the Court will decline to decree it to his attorney, for his use and benefit (*i*).

On one occasion the Court granted, to the agent of the Elector of Hesse, an administration limited to substantiate proceedings in Chancery respecting a debt due to the late Elector; but declined to extend the administration to the receipt of the debt, without a power of attorney from the proper authorities (*k*).

to whom the attorney is responsible:

Where letters of administration are granted to persons under a power of attorney from the party entitled to the representa-

L. R. 8 Ex. 119: and it makes no difference that the grant of administration to the plaintiff is, in its terms, of the goods, &c., "*left unadministered*" by the next of kin: *Mitchell v. Moorman*, *ubi sup.*

(*f*) *Ante*, p. 193.

(*g*) *Ackerley v. Oldham*, 1 Phillim. 248; *Ackerley v. Parkinson*, 3 M. & S. 411; *In the goods of Fell*, 2 Sw. & Tr. 126.

(*h*) Toller, 108; but see *In the goods of Burch*, 2 Sw. & Tr. 139. As to what shall constitute a proper authority to apply for the grant, as the attorney of the party entitled to it, see *Lucas v. Lucas*, 3 Cas. temp. Lee. 576; *In the goods of Reitz*, 3 Hagg. 766; *In the goods of Elderton*, 4 Hagg. 210. A general power of attorney executed before the testator's death, has been held sufficient: *In the goods of Barker*, [1891] P. 251; for a grant to a substituted attorney, see *Palliser v. Ord*, Bunb. Ex. Rep. 166; *In the goods of Abdul Hamid Bey*, 67 L. J. P. & M. 59.

(*i*) *In the goods of Burch*, 2 Sw. & Tr. 139. But see *In the goods of Bullar*, 39 L. J. P. & M. 26.

(*k*) *In the goods of the Elector of Hesse*, 1 Hagg. 93. See also *In the goods of Beggia*, 1 Add. 340.

tion, the letters express that they are granted "for the use and benefit" of the latter (l). But these words do not exclude the claim of other persons to share in the personal estate (m). It was, indeed, held, in the case of *De la Viesca v. Lubbock* (n), that where administration has been granted to the attorney of a person abroad for the use and benefit of that person, the latter may sue the administrator in this country without making the parties beneficially interested parties to the suit, and without taking out letters of administration in this country; for that as the letters were expressly granted to the administrator as the attorney of the party abroad, he might safely pay over to that party the moneys received under the authority of the letters. In the subsequent case of *Chambers v. Bicknell* (o), it was held that such an administrator is liable to be sued, in respect of the estate of the intestate, by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right (p). It was, however, pointed out by Jessel, M. R., in the case of *Eames v. Hacon* (q), in which case the decision in *De la Viesca v. Lubbock* was approved of, that it did not follow that because such an administrator was liable to be sued by the next of kin, that he cannot when he has not been sued, hand over the money to the person for whose use and benefit the letters were granted, the two propositions not being correlative; and assets, the learned judge said, collected by the agent of a trustee have often been intercepted in the agent's hands by the *cestui que trusts*; but if they take no steps for that purpose the agent is safe in paying the trustee. But in the case of *Re Rendell* (r) Cozens-Hardy, J., held that an attorney cannot obtain a good discharge from his principal where the principal is not legal personal representative in any country, but that the attorney is responsible himself for the due distribution of the assets.

attorney cannot obtain a good discharge from his principal where latter is not legal personal representative in any country.

(l) The form of such letters will be found at full length in *De la Viesca v. Lubbock*, 10 Sim. 629; 2 Hare, 537, note (a). See also *In the goods of Cassidy*, 4 Hagg. 360, *post*, p. 384.

(m) *Anstruther v. Chalmer*, 2 Sim. 5; *Chambers v. Bicknell*, 2 Hare, 536.

(n) 10 Sim. 629. The case of *De la Viesca v. Lubbock* was approved by Jessel, M. R., in *Eames v. Hacon*, 18 C. D. 347, 352, in the argument of which case, *Chambers v. Bicknell*, *supra*, and *Att.-Gen. v. Kohler*, 9 H. L. C. 654, were cited.

(o) 2 Hare, 536.

(p) See also *accord. Re Dewell*, 4 Drew. 269; *Att.-Gen. v. Kohler*, 9 H. of L. 654.

(q) 18 C. D. 347, O. A.

(r) [1901] 1 Ch. 230.

The general rule is, that where a person is authorized by a simple power of attorney to take out administration, the Court ought to decree him such administration as it would have granted to the person who conferred the power, if he had applied for it himself (s).

If the attorney be resident out of the jurisdiction, the sureties to the bond must be resident within the kingdom (t).

Administra-
tion granted
to a creditor:

If none of the next of kin will take out administration a creditor may, by custom, do it (u): on the single ground that he cannot be paid his debt until representation to the deceased is made (x); and therefore administration is only granted to him, failing every other representative (y). So letters of administration may be granted to the executors of a creditor (z).

even though
his right of
action be
statute
barred:

It was decided that a creditor is entitled to a grant of administration, although his right of action is barred by the Statute of Limitations, but the Court made it a condition that the administration bond should contain an obligation to distribute the estate rateably with other creditors, and without any preference of his own debt, as the administering creditor in the absence of any condition to the contrary is entitled to retain his own debt in preference to the debts of the other creditors (a). In the case of *In the goods of Brackenbury* (b), Sir James Hannen said that he would not for the future, whether other

(s) *In the goods of Goldsborough*, 1 Sw. & Tr. 295.

(t) *In the goods of Leeson*, 1 Sw. & Tr. 463. But see *In the goods of Reed*, 3 Sw. & Tr. 439, in which case the Court accepted sureties resident in Jersey where the person to whom a limited grant of administration was made was resident without the jurisdiction, and was unable to procure justifying sureties within the jurisdiction. See also *In the goods of Ballingall*, *ib.* 441; *post*, Pt. I. Bk. v. Ch. iv. p. 434.

(u) 2 Black. Comm. 505. He has no right to the administration except by the practice of the Court. He is the appointee of the Court: And if circumstances showed that the creditor was not a proper person, *non constat* that the Court might not appoint another: *Menzies v. Pulbrook*, 2 Curt. 850.

(x) *Elme v. Da Costa*, 1 Phillim. 177.

(y) *Webb v. Needham*, 1 Add. 494. A creditor cannot deny an interest or oppose a Will: *Dabbs v. Chisman*, 1 Phillim. 159; *Elme v. Da Costa*, 1 Phillim. 177; *Menzies v. Pulbrook*, 2 Curt. 845; *cf. ante*, p. 240; and see *post*, p. 356.

(z) *Jones v. Beytagh*, 3 Phillim. 635. The husband of a woman, who before marriage has partly administered as a creditor, on her death, is not entitled in his own right as creditor, but only as representative of his wife: *In the goods of Risdon*, L. R. 1 P. & D. 637.

(a) *In the goods of Coombs*, L. R. 1 P. & D. 193; *Coombs v. Coombs*, *ib.* 288.

(b) 2 P. D. 272.

creditors were present or not to make objection, grant administration to a creditor unless he consented to pay all the debts, *pro ratâ*, if so required by the Court. The recent form of a creditor's administration bond was that the administrator shall "well and truly administer according to law (that is to say), do pay all and singular the debts which he did owe at his decease, in a due course of administration, rateably and proportionably, and according to the priority required by law, and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator as aforesaid." It was, however, decided that this condition did not take away the right of retainer (*c*). In consequence of these decisions the bond has been changed, and the form now is that the administering creditor will pay the debts of the deceased in due course of administration, rateably and proportionably, "and according to the priority required by law, not, however, preferring his own debt by reason of his being administrator as aforesaid" (*d*).

but present form of bond precludes him preferring his own debt:

The necessary course when a creditor applies for administration, is to issue a citation for the next of kin, and persons entitled in distribution in particular, and the heir-at-law if in cases coming within the Land Transfer Act, 1897, and all others in general, to accept or refuse letters of administration, or show cause why administration should not be granted to such creditor (*e*). In point of practice it is not uncommon, upon a decree issuing, to show cause why administration should not be committed to A. B., a creditor, for the Court to substitute C. D., another creditor, on the day assigned for the

citation by creditor of next of kin:

(*c*) *Davies v. Parry*, [1899] 1 Ch. 602; *Re Belham*, [1901] 2 Ch. 52.

(*d*) See Practice note in W. N. (1899) 262.

(*e*) Whenever a party has a right to the administration, the Court always requires that he should be cited or consent: *In the goods of Barker*, 1 Curt. 592; *In the goods of Keene*, 1 Sw. & Tr. 267; *Pegg v. Chamberlain*, *ib.* 528. In the case of a small estate, the Court has dispensed with the citation of the next of kin on proof that they had notice of the application: *In the goods of Teece*, [1896] P. 6; *In the goods of Morgan*, 75 L. T. 190; *In the estate of Heerman*, [1910] P. 357; *In the goods of Bishop*, 108 L. T. 928. The Court has also dispensed with citation and advertisement where the estate was small and the next of kin had not been heard of for many years: *In the goods of Reed*, 29 L. T. N. S. 932; *In the goods of Callicott*, [1899] P. 189; the applicant for the grant in each case swearing that they believed themselves sole next of kin. See also *In the estate of Byrne*, 84 L. T. 570; *In the estate of Chapman*, [1903] P. 192; *In the estate of Jackson*, 87 L. T. 747; *In the estate of Harper*, [1899] P. 59.

appearance of the parties interested, and to suffer administration to pass to C. D. without any further citation, though not the person in whose name the decree originally went (*f*). The next of kin may appear to the citation, and will then be preferred to the creditor; but if the next of kin has unduly delayed to take out administration (as where six months elapse from the death of the intestate), the creditor will be allowed his costs (*g*). If there are no next of kin, as in the case of an intestate bastard, notice of the application for letters of administration must be given to His Majesty's Procurator General, or in case the deceased died domiciled within the Duchy of Lancaster to the solicitor for the Duchy in London (*h*). In the case of persons dying intestate without any known relatives, a citation must be issued against the next of kin, if any, and all persons having, or pretending to have, any interest in the estate of the deceased, and such citation must be served on the King's Proctor or upon the solicitor for the Duchy of Lancaster as the case may require (*i*).

citation must
be personally
served if
possible:
if not pos-
sible, by
advertisement
in news-
papers:

Citations must be served personally, when that can be done, by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do. If a citation cannot be served personally, it must be served by insertion of the same, or of an abstract settled and signed by one of the Registrars of the Court as an advertisement in such morning and evening London newspapers and such local newspapers and at such intervals as the Judge or Registrar may direct (*k*).

The Court does sometimes grant administration to more creditors than one, but it prefers that one should be fixed upon (*l*).

(*f*) *Talbot v. Andrews*, 1 Hagg. 697; *Andrews v. Murphy*, 4 Sw. & Tr. 198; 30 L. J. P. & M. 37.

(*g*) *Cole v. Rea*, 2 Phillim. 428. See *Jones v. Beytagh*, 3 Phillim. 635.

(*h*) See rule 75, P. R. 1862 (Non-contentious).

(*i*) See rule 76, P. R. 1862 (Non-contentious).

(*k*) Rules 69 and 70, P. R. 1862 (Non-contentious).

(*l*) *Harrison v. All persons in general*, 2 Phillim. 249. See as to the practice of preferring one creditor to another, by reason of the superior nature, or larger amount of the debt, *Kearney v. Whitaker*, 2 Cas. temp. Lee, 324; *Carpenter v. Shelford*, *ib.* 502. And see now the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), declaring that in the administration of any person dying after Jan. 1st, 1870, no debt is to be entitled to any priority by reason of its being a specialty debt. See also *In re Samson*, [1906] 2 Ch. 584; *In re Harris*, [1914] 2 Ch. 395; *In re Hastings*, 6 Ch. D. 610. As to the bond to be entered into, see *ante*, p. 353.

Before granting letters of administration to a creditor, the Court always requires an affidavit as to the amount of the property to be administered (*m*). An affidavit is also necessary of the particulars and date of the debt, and that the creditor has no security (*n*).

affidavit of
the amount of
property, &c.

A person who was joint assignee of the estate of a bankrupt with the deceased, out of which the latter had applied a sum of money to his own use, for which he had not accounted at the time of his death, is not a creditor to the estate of the deceased so as to be entitled to pray administration to him (*o*).

who is not to
be considered
a creditor:

On one occasion (*p*) where a partner died leaving the partnership accounts unsettled, an eminent civilian (*q*), before whom a case was laid by the direction of Sir John Leach, V.-C., gave his opinion that a person to whom one of the surviving partners had assigned his share of the profits of the partnership had not such an interest in the effects of the deceased partner as would entitle him to be considered a creditor, and in that character to cite the next of kin to accept or refuse administration of his effects: but that the Ecclesiastical Court would grant a limited administration to a person nominated by him, for the purpose of substantiating proceedings in Chancery, on the refusal of the next of kin after citation, and upon showing the necessity for such a representation.

It is the established practice of the Court to refuse to grant administration as creditor to a person who has bought up a debt after the death of the deceased (*r*).

creditor who
has bought
up debt after
death of
debtor not
entitled to ad-
ministration
as creditor:

(*m*) *Martineau v. Rede*, 2 Add. 455; *Briggs v. Roope*, 29 L. J. P. & M. 96.

(*n*) *Aitkin v. Ford*, 3 Hagg. 193. Further, as to the practice where a grant is made to a creditor, see Mortimer on Probate, pp. 469—471.

(*o*) *Snappe v. Webb*, 2 Cas. temp. Lee, 411.

(*p*) *Cawthorn v. Chalie*, 2 Sim. & Stu. 129.

(*q*) Dr. Jenner.

(*r*) *Depit v. Delerieleuse*, 2 Sw. & Tr. 131; *In the goods of Coles*, 3 Sw. & Tr. 181; *S. C., nomine Macnin v. Coles*, 33 L. J. P. M. & A. 175; *Day v. Thompson*, 3 Sw. & Tr. 169; *Downward v. Dickinson*, 3 Sw. & Tr. 564. But where a creditor who had obtained administration of the estate of an intestate died a bankrupt, without having fully administered and leaving the debt due to himself still unsatisfied, and after his death his trustee in bankruptcy assigned the unsatisfied debt due to his estate from the intestate's estate to one of his creditors; the Court made a grant of administration *de bonis non* to such assignee limited to the interest in the intestate's estate which had been assigned: *In the goods of Burdett*, 1 P. D. 427. See also *In the goods of Cosh*, 53 S. J. 755; 25 T. L. R. 784. As to administration being granted to an undertaker as a creditor for funeral expenses, see *Newcome v. Beloe*, L. R. 1 P. & D. 314.

But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased, who has assigned it, by way of mortgage or otherwise, to the parties seeking the grant (s).

seems, as to surety who has paid off debt after death of principal:

It has been held, that a surety who, after the death of the principal, pays off the debt, is entitled to be regarded as a creditor of the estate of the deceased, so as to be entitled to pray administration to him (t).

In the case of *Aitkin v. Ford* (u), administration, as to a creditor, was decreed to the mother of an intestate, who had been advanced by her: the father, though alive, having been divorced in the Commissary Court of Scotland, and married again. In *Hudleston v. Hudleston* (v), administration to the effects of a wife who had lived with her husband until her death, was granted to an antenuptial creditor of the wife (x).

In *In the estate of Toscani* (y), the executor named in the Will having renounced was afterwards, on the death of the administratrix, permitted to take administration *de bonis non* in his capacity of creditor.

next of kin cannot oust a creditor administrator during his life:

When a creditor administrator has been duly appointed, the next of kin cannot, during his lifetime, take the administration from him: but upon his death they may come in, and claim administration *de bonis non* (z).

a creditor in possession of administration may oppose an interest or contest a Will.

Although, before administration granted, a creditor cannot deny an interest or oppose a Will, yet, when he has obtained administration, he has a right to maintain it against the executor or the next of kin; and it is not to be revoked on mere suggestion (a). And where administration has been granted to a creditor, and a Will is afterwards produced, he is entitled to

(s) *In the goods of Godfrey*, 2 Sw. & Tr. 133; *In the goods of Coles*, 3 Sw. & Tr. 181; *In the goods of Quilliam* (1898), 79 L. T. 472; *Downward v. Dickinson*, 3 Sw. & Tr. 564: nor with a grant to the assignee of a creditor where he is assignee in bankruptcy: *ibid*.

(t) *Williams v. Jukes*, 34 L. J. P. & M. 60.

(u) 3 Hagg. 193.

(v) 2 Robert. 424.

(x) A decree had been personally served on the husband, but no appearance was given.

(y) [1912] P. 1.

(z) *Skeffington v. White*, 1 Hagg. 702, 703; and see *In the goods of Thacker*, [1900] P. 15; and cf. *ante*, p. 339.

(a) *Elme v. Da Costa*, 1 Phillim. 173; *Menzies v. Pulbrook*, 2 Curt. 851; *ante*, p. 240. And he is not bound to bring in the administration till an admissible allegation has been brought in, either propounding a Will, or propounding an interest: *Dabbs v. Chisman*, 1 Phillim. 159, 160.

contest it in the same manner that the next of kin might have done, and is in the same position as the next of kin with regard to costs (*b*).

For want as well of creditors, as of next of kin, desirous to take out administration, the Court may grant it to any person at its discretion (*c*). In a case where the brother and only next of kin renounced, the Court granted administration to the nephew, although he had no interest (*d*). Or the Court may, *ex officio*, grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the deceased. In a case, where a sole next of kin refused to take administration, the Court decreed letters of administration to a person who had been her agent, limited "to the collection of all the personal property of the deceased, and giving discharges for the debts which might have been due to the estate on the payment of the same, and doing what further might be necessary for the preservation of the property aforesaid, and to the safe keeping of the same, to abide the directions of the Court" (*e*). So,

When administration may be granted to a person without interest;

letters *ad colligendum*.

(*b*) *Norman v. Bourne*, 1 Phillim. 160, note (*c*) to *Dabbs v. Chisman*, 2 Curt. 851; *ante*, p. 240.

(*c*) See the judgment of Sir H. Jenner Fust, 1 Robert. 274, 275; *In the goods of Chanter*, *Davis v. Chanter*, 14 Sim. 212. In a case where the widow and all the next of kin and persons entitled in distribution, having been cited, did not appear, the Court made a general grant of administration to the receiver: *In the goods of Mayer*, L. R. 3 P. & D. 39. Where there were no known relatives, and no residuary legatee appointed, having regard to the special circumstances of the case, administration with the Will annexed, limited to the estate disposed of by the Will, was granted to a stranger: *In the goods of Jackson*, [1892] P. 257. In a case where the widow of the intestate was a lunatic, and his mother, his only next of kin, was unable to furnish justifying security, and a suit had been instituted in the Chancery Division and a receiver appointed, administration was granted to the receiver: *In the goods of Moore*, [1892] P. 145. Where the sole next of kin of an intestate was a lunatic, her committee having renounced, a stranger in blood applied for a grant of administration. The Court, upon the consent of the next of kin of the lunatic being filed, ordered the grant to be made, the Master in Lunacy and the next of kin of the lunatic approving of the application: *In the goods of Hastings*, 4 P. D. 73. And see the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73, *post*, pp. 359—363.

(*d*) *In the goods of Keane*, 1 Hagg. 692. See also *In the goods of Blagrove*, 2 Hagg. 83; *In the goods of Johnson*, 2 Sw. & Tr. 595. But see *In the goods of Allen*, 3 Sw. & Tr. 559. See also *In the goods of Trigg*, [1901] P. 42.

(*e*) *In the goods of Radnall*, 2 Add. 232. Where it is for the benefit of the absent or unknown next of kin the Court will direct an administrator *ad colligenda bona* to dispose of the property or of any portion of it by sale: *In the goods of Schwerdtfeger*, 1 P. D. 424; *In the goods of Roberts*, [1898] P. 149, *ante*, p. 324; *In the goods of Bolton*, [1899] P. 186.

in a subsequent case (*f*), the Court, under special circumstances, made a grant to a creditor *ad colligendum bona*, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises, which would expire before a general grant could be made. But the Court refused to include in the grant a power to dispose of the lease and good-will of the business, or a power to carry on the business. Or the Court may take the goods of the deceased into its own hands, to pay the debts of the deceased in such order as an executor or administrator ought to pay them (*g*).

Grant to the
Public
Trustee,
6 Edw. VII.
c. 55.

By the Public Trustee Act, 1906 (6 Edw. 7, c. 55), the Public Trustee is constituted a corporation sole with certain duties. (Sect. 1.)

Sect. 6 (1) of that Act provides: "If in pursuance of any rule under this Act (*h*) the Public Trustee is authorised to accept by that name probates of Wills or letters of administration, the Court having jurisdiction to grant probate of a Will or letters of administration may grant such probate or letters to the Public Trustee by that name, and for that purpose the Court shall consider the Public Trustee as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the Public Trustee shall not be required for the grant of letters of administration to any other person, and that, as between the Public Trustee and the widower, widow or next of kin of the deceased, the widower, widow or next of kin shall be preferred, unless for good cause shown to the contrary."

Instructions with regard to applications by the Public Trustee under this section were issued on March 27th, 1908, and are as follows:—

1. For grants of letters of administration—

(a) When the Public Trustee applies for letters of ad-

(*f*) *In the goods of Clarkington*, 2 Sw. & Tr. 380; *In the goods of Ashley*, 15 P. D. 120; *In the estate of Heerman*, [1910] P. 351. See also *In the goods of Wyckhoff*, 3 Sw. & Tr. 20, where a similar grant was made under the 73rd section of the Court of Probate Act, 1857, *infra*: According to the modern practice the Court sometimes gives power to sell property, see *In the goods of Roberts*, [1898] P. 149; *Whitehead v. Palmer*, [1908] 1 K. B. 151; and *ante*, p. 178.

(*g*) 11 Vin. Abr. 87, Exors. (K.) pl. 19; and see *ante*, p. 192.

(*h*) By the Public Trustee Rules, 1907, r. 7 (1), the Public Trustee is authorised to accept probates and letters of administration of any kind; and can take a grant in the case of persons domiciled abroad: *In the estates of Grundt and Oettl*, [1915] P. 126, 128.

ministration, notice should be given by him to the widower, widow, heir-at-law, next of kin, and persons entitled in distribution or their representatives, as the case may be, or such of them as can, without delay, be communicated with, intimating that the application for the grant is being made by the Public Trustee, and that unless application for a grant be made, or a caveat be entered, within eight days from the date of the posting of the notices, he will proceed with his application without further notice; but if a person to whom notice is sent is not in the United Kingdom the period of eight days shall be increased by the addition of time sufficient for a reply by return of post in ordinary course of postage from the place to which the notice is sent.

- (b) If any application for a grant in preference to the Public Trustee be made, the question of preference may be dealt with by one of the registrars, or on an application to the Court.
- (c) If a caveat be entered, the usual practice is to be followed.
- (d) If it is suggested that there is a Will, the Public Trustee must first cite the executors and the persons interested thereunder to propound the same.

2. When the Public Trustee applies for letters of administration with the Will annexed, he must clear off executors in the usual way, and notice should be given, as above mentioned, to the residuary legatees and devisees, or their representatives, as the case may be, or, if there are no residuary legatees and devisees, to the person or persons entitled to the undisposed-of residue, or their representatives.

3. In the wording of the grant, the Public Trustee should be described as "the Public Trustee" (*i*).

The power of the Court in making grants of administration, and in deciding to whom they should be granted, has been 20 & 21 Vict.
c. 77, s. 73.

(*i*) No bond is required from the Public Trustee when he takes administration, whether with the Will annexed or on intestacy. It is considered that, if he takes probate as executor, he thereby continues the chain of executorship. For cases of grants to the Public Trustee, as custodian of enemy property, of administration to the estates of alien enemies, *vide post*, p. 364, note (*u*).

much enlarged by the 73rd section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

where a person shall die intestate or without an executor willing and competent to take probate: or where the executor is resident out of the United Kingdom: if it shall appear to be necessary, the Court may appoint a person administrator who would not be otherwise entitled to the grant:

on giving security, and limited as the Court shall think fit.

It is thereby enacted, that "where a person has died or shall die wholly intestate as to his personal estate, or leaving a Will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate (*j*), or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland (*k*), and it shall appear to the Court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof; but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit" (*l*).

(*j*) Where the sole executrix and universal legatee was a lunatic, the Court granted administration to a creditor: *In the goods of Ather-ton*, [1892] P. 104. And where the sole executrix was under age, granted administration to persons named in the Will as trustees: *In the goods of Stewart*, L. R. 3 P. & D. 244. So a grant was made to one of the residuary legatees where the identity of the executor could not be ascertained: *In the goods of Sawtell*, 2 Sw. & Tr. 448.

(*k*) The Court cannot, under this section, pass over an executor by reason only of his bad character; he must also be resident out of the United Kingdom: *In the goods of Sampson*, L. R. 3 P. & D. 48. But see *In the estate of Drawmer*, 108 L. T. 732, where an executor undergoing imprisonment for conspiracy was passed over; and see *In the goods of Wright*, 79 L. T. 473. An executor who was out of the Kingdom was passed over, and a grant made to a beneficiary under the Will: *In the goods of Cooper*, L. R. 2 P. & D. 21; *In the estate of Wohlgemuth*, 54 Sol. J. 460; the guardian of the universal legatee: *In the goods of Batterbee*, L. R. 14 P. D. 39; a partner of one of the executors: *In the goods of Taylor*, [1892] P. 90; to the sole beneficiary under the Will: *In the goods of Crawshaw*, [1893] P. 108; to one of the residuary legatees: *In the estate of Massey*, [1899] P. 270; *In the estate of Williams*, [1918] P. 122.

(*l*) The Court will not make a grant under this section, unless there are special circumstances to justify it: *In the goods of White*, 2 Sw. & Tr. 457. In order to satisfy the Court that it is "necessary

By rule 31, P. R. (Non-contentious), "whenever the Court, under sect. 73, appoints an administrator other than the person

Rule 31, P.R.
(Non-contentious.)

and convenient" that the extraordinary power given by the section should be used by the Court, a general statement that "it is necessary for the preservation of the personal estate and effects of the deceased that the grant should be made" is not sufficient: *In the goods of Cooke*, 1 Sw. & Tr. 267; *In the goods of Bateman*, L. R. 2 P. & D. 242. In the following cases, where the Court has thought that the circumstances have warranted such a grant, it has been made: i. To a creditor: *In the goods of Fraser*, L. R. 1 P. & D. 327; *In the goods of Farrands*, 1 P. D. 439; *In the goods of Wensley*, 7 P. D. 13; *In the goods of Atherton*, [1892] P. 104; *In the goods of Heerman*, [1910] P. 357; *In the goods of Bishop*, 108 L. T. 928. ii. To a trustee of the marriage settlement of the sole next of kin: *In the goods of Maychell*, 4 P. D. 74. iii. To the trustee appointed by the Will: *In the goods of Cosnahan*, L. R. 1 P. & D. 183; *In the goods of Stewart*, 3 P. & D. 244. iv. To the trustee in bankruptcy of sole next of kin: *In the goods of Turner*, 12 P. D. 18; *In the goods of Conolly* (1896), 74 L. T. 461; *In the goods of Agnese*, [1900] P. 60. v. To the nominee of a married woman, on the objection by her husband to her taking probate or administration: *In the goods of Warren*, L. R. 1 P. & D. 538; *Clerke v. Clerke*, 6 P. D. 103. vi. To the nominee of a married woman, residuary legatee, without notice to husband: *In the goods of Pine*, L. R. 1 P. & D. 388; and see *In the goods of Campion*, [1900] P. 13. vii. To the guardians of minors: *In the goods of Hagger*, 3 Sw. & Tr. 65; *In the goods of Burgess*, 4 Sw. & Tr. 188; *In the goods of See*, 4 P. D. 86; *In the goods of Webb*, 13 P. D. 71; *In the goods of Batterbee*, 14 P. D. 39; *In the goods of Arden*, [1898] P. 147. viii. To a residuary legatee test. annex.: *In the goods of Sawtell*, 2 Sw. & Tr. 448; *In the goods of Crawshay*, [1893] P. 108; *In the goods of Massey*, [1899] P. 270. ix. To the executor under a colonial Will: *In the goods of Earl*, L. R. 1 P. & D. 450 (*vide ante*, p. 273). x. To a sister of the intestate; limited until next of kin should apply for administration: *In the goods of Cholwill*, L. R. 1 P. & D. 192. xi. To a sister of the intestate; passing over the mother who was willing to renounce: *In the goods of Llanwarne*, L. R. 1 P. & D. 306. xii. To a sister of the intestate; without taking out personal representation to the father, who also had died intestate: *In the goods of Peck*, 2 Sw. & Tr. 506; *In the goods of Harling*, [1900] P. 59. xiii. To the father in law of the sole next of kin in Australia: *In the goods of Jones*, 1 Sw. & Tr. 13. xiv. To a mother; without requiring her to take out administration to the father: *In the goods of Smith*, 2 Sw. & Tr. 508. xv. To the step mother; for the use and benefit of the sole next of kin, a lunatic without committee: *In the goods of Burrell*, 1 Sw. & Tr. 64. xvi. To a cousin; limited to carry out certain directions contained in a letter: *In the goods of Drinkwater*, 2 Sw. & Tr. 611. xvii. To a cousin; for the use and benefit of an aged aunt and uncle, the only persons entitled to distribution: *In the goods of Roberts*, 1 Sw. & Tr. 64; and see *In the goods of Davis*, [1906] P. 330. xviii. To the guardians of the poor; limited during the lunacy of the sole next of kin, a pauper lunatic: *In the goods of Findlay*, 3 Sw. & Tr. 265; *In the goods of Eccles*, 15 P. D. 1; *In the goods of Everley*, [1892] P. 50. xix. To the attorney in England of the next of kin abroad; it being unknown when the absentee would return: *In the goods of Escot*, 4 Sw. & Tr. 186; and see *In the goods of Barton*, [1898] P. 11. xx. To the next of kin and to a person entitled in distribution—jointly; there being special circumstances rendering a joint grant convenient: *In the goods of Grundy*, L. R. 1 P. & D. 459; *In the goods of Walsh*, [1892] P.

who, prior to the Court of Probate Act, 1857, would have been entitled to the grant, the same is to be made plainly to

230. xxi. To a *stranger*; no next of kin or creditor being willing, or able, to take the grant: *In the goods of Bateman*, L. R. 2 P. & D. 242; and see *In the goods of Moffatt*, [1900] P. 152. xxii. To a *stranger*; there being doubt as to the legitimacy of the sole next of kin: *In the goods of Hopkins*, L. R. 3 P. & D. 235. xxiii. To a *person applying in pursuance of an agreement to divide the estate*; where doubts had arisen as to the legitimacy of the person claiming to be next of kin: *In the goods of Minshull*, 14 P. D. 151. xxiv. To the *partner of one of the executors of the Will* who was mentioned by name in the Will and was therein requested to act for such executor if he were absent at the time of the testator's death: *In the goods of Taylor*, [1892] P. 90. xxv. To the *person with powers of committee of estate of next of kin*, who was mentally incapacitated: *In the goods of Leese*, [1894] P. 160; and see *In the goods of Cooke*, [1895] P. 68. xxvi. To the *executor of the widow of intestate husband*, the widow having died without taking administration, and being entitled to the whole of the husband's estate as under 500*l.* under sect. 1 of Intestates' Estates Act, 1890: *In the goods of Bryant*, [1896] P. 159; *In the goods of Green* (1901), 84 L. T. 61. xxvii. To a *member of the firm of accountants in London*, in whose hands the books of the intestate's firm had been placed, the next of kin being in the interior of Bolivia, where it took six weeks to communicate with them by telegram and four months by letter; the grant being limited till such time as next of kin should apply: *In the goods of Suarez*, [1897] P. 82. xxviii. To the *son of a testatrix whose husband had deserted her fifteen years before her death*, and had not been heard of since: *In the goods of Shoosmith*, [1894] P. 23; and see *In the goods of Stevens*, [1898] P. 126. xxix. To a *grandson of the intestate*, his next of kin, a son, not having been heard of for twenty-six years: *In the goods of John Callicott*, [1899] P. 189. xxx. To the *next of kin of a murdered wife*, the husband having been convicted of murder, passing over the husband's legal personal representative: *In the estate of Crippen*, [1911] P. 108; and see *In the estate of Hall* (manslaughter), [1914] P. 1. xxxi. To *one of the residuary legatees*, where the executor was undergoing imprisonment for conspiracy, and had refused to renounce: *In the estate of Drawmer* (1913), 108 L. T. 732. xxxii. To the *Official Receiver*, as trustee in bankruptcy of husband: *In the goods of Bowron*, 84 L. J. P. 92. Generally the Court will not grant administration under this section to a person entitled to a grant in another character, e.g., as a creditor: *In the goods of Fairweather*, 2 Sw. & Tr. 588. Nor to the nominee of the person entitled to the grant: *Teague v. Wharton*, L. R. 2 P. & D. 360; *In the goods of Hale*, L. R. 3 P. & D. 207; *In the goods of Brotherton*, [1901] P. 139. But in *Farrell v. Brownbill*, 3 Sw. & Tr. 467, the Court granted administration under this section, with the consent of all parties interested, to their nominee, who took no interest in the property himself. And see *In the goods of Potter*, [1899] P. 265; *In the estate of Davis*, [1906] P. 330; and *In the estate of Watkin*, [1915] P. 24. See also *In the goods of Clayton*, 11 P. D. 76. But see *In the goods of Richardson*, L. R. 2 P. & D. 244, in which it was held that the consent of all persons interested is not sufficient ground for departing from the general rules as to grants. The section is wholly inapplicable where there is no absence of persons entitled to administration and no insolvency. It would then be a mere arbitrary selection on the part of the Court: *Haynes v. Matthews*, 1 Sw. & Tr. 460. The Court will not exercise the power conferred on it by the above section by passing

appear in the oath of the administrator, in the letters of administration and in the administration bond."

In concluding this subject, it may be expedient to advert to an established rule of the Ecclesiastical Court, viz., that wherever a party has a prior right to administer, the Court requires that he should be cited or consent, before it will grant administration to any other person. And the rule will not be relaxed, notwithstanding the party who has the right has no interest in the property in respect of which the grant of administration is sought (*m*). But in cases where the Court has a discretion, viz., in cases where the party entitled in priority is so entitled by the practice of the Court, and not by statute, the Court will sometimes dispense with the citation or consent of the party having the prior claim (*n*). In granting administration under sect. 73 of the Court of Probate Act, the Court has also, in special circumstances, dispensed with citation (*o*).

Citation or consent of party having a prior right requisite before administration granted to another.

SECTION II.

Who are incapable of being Administrators.

A widow, or next of kin, who would otherwise be entitled, may be incapable of the office of administrator on account of some legal disqualification.

Widow or next of kin may be incapable of office of administrator.

over a person entitled to a grant of administration in favour of a creditor when the fact of the insolvency of the intestate is disputed: *Hawke v. Wedderburne*, L. R. 1 P. & D. 594: unless there is no next of kin competent to take administration: *In the goods of Farrands*, 1 P. D. 439.

(*m*) *In the goods of Barker*, 1 Curt. 592; *In the goods of Currey*, 5 Notes of Cas. 54. When the next of kin is of unsound mind, the practice is that his next of kin must also be cited, in order that they may take administration for his use and benefit if they think proper: *Windeatt v. Sharland*, L. R. 2 P. & D. 217.

(*n*) *In the goods of Rogerson*, 2 Curt. 656; *In the goods of Southmead*, 3 Curt. 28; *In the goods of Widger*, *ib.* 55; *In the goods of Burchmore*, L. R. 3 P. & D. 139; *In the goods of Gardiner*, 9 P. D. 66; *In the goods of Webb*, 13 P. D. 71. And see *In the goods of Kinchella*, [1894] P. 264. The Court granted administration to the sister of a bachelor intestate, upon a proxy of renunciation from the mother (a married woman) without her husband joining in it, she living separate from her husband, and all right to the estate and effects of the deceased having been conveyed to her under a deed of separation: *In the goods of Hardinge*, 2 Curt. 640.

(*o*) *In the goods of Hagger*, 3 Sw. & Tr. 65; *In the goods of Burgess*, 4 Sw. & Tr. 188; *In the goods of Batterbee*, 14 P. D. 39; *In the goods of Atherton*, [1892] P. 104; *In the goods of Crawshaw*, [1893] P. 108; *In the goods of Moffatt*, [1900] P. 152; *In the estate of Heerman*, [1910] P. 357.

It will be shown in a subsequent part of this Treatise, to whom, upon such an event, the administration is to be committed (*p*).

Incapacities
of adminis-
trator.

The incapacities of an administrator not only comprise those persons who have already been mentioned as disqualified for the office of executor (*q*) but extend to outlawry (*r*), and bankruptcy (*s*), or other lawful disability.

Alien.

But it is no incapacity to be an administrator that the next of kin is an alien (*t*). During a state of war, however, it seems that administration will not be granted to an alien enemy (*u*).

Infancy.

If the next of kin be a minor, administration must be granted to another person during his minority; which species of administration will hereafter be considered separately (*x*). But on one occasion, administration, limited to the receipts of dividends in the English funds, was granted by Sir John Nicholl to a minor residuary legatee, the wife of a minor, both subjects of and resident in Portugal, on a certificate being produced that, by the law of Portugal, she was entitled (*y*).

(*p*) See *post*, Pt. I. Bk. v. Ch. III. § VI.

(*q*) See *ante*, pp. 155—158.

(*r*) 1 Roll. Abr. 908; Bac. Abr. Exors. (G.); Toller, 93.

(*s*) *Hills v. Mills*, 1 Salk. 36; Com. Dig. Admor. (B.) 6.

(*t*) Com. Dig. Admor. (B.) 6. And see sect. 17 of the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17). Upon this subject, see *ante*, p. 153.

(*u*) On August 24th, 1914, a notification was made by the President of the Probate Division that during the war no probate of a Will or letters of administration of the estates of alien enemies, wherever resident, would be granted in respect of any assets in this country, without the express licence of the Crown; and in cases where probate or letters of administration were granted during the recent war, the grant was made upon the condition that no portion of the assets should be distributed or paid during the war to any beneficiary or creditor who was a subject of an enemy State, wherever resident, or to any one on his behalf, or to or on behalf of any person resident in an enemy State, of whatever nationality, without the express sanction of the Crown, acting through the Treasury. Under the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), a custodian of enemy property was constituted, and by sect. 1 (2), the Public Trustee was appointed to be the custodian for England and Wales. And in *In the estate of Schiff*, [1915] P. 86, the practice was laid down that in cases where persons entitled to the assets of a deceased person were alien enemies, the Public Trustee, as custodian, should take the grant of administration, by reason of the "special circumstances" under sect. 73 of the Court of Probate Act, 1857. And see *In the estates of Grundt and Oetli*, [1915] P. 126; *Schulze's Case* (1917), S. C. 400; *In the estate of Krejewsky*, 34 T. L. R. 184; *In the estate of Woolf*, [1918] W. N. 205.

(*x*) *Post*, Pt. I. Bk. v. Ch. III. § III. p. 392; and see also p. 387.

(*y*) *In the goods of the Countess of Da Cunha*, 1 Hagg. 237.

However, in a subsequent case, Sir C. Cresswell refused to grant administration to a minor, though by the law of the country where the deceased was domiciled the minor was entitled to the grant, and that learned judge appeared to be of opinion that the Court ought not to follow the practice of the Court of Domicil, where it was in contradiction to the English law, according to which the minor could not take upon himself the liabilities which the law casts upon an administrator—for instance, he could not execute a bond (z).

Coverture was no incapacity, even before the Married Women's Property Act, 1882, for the office of administratrix. Therefore, if a *feme covert* be next of kin to the intestate, administration shall be granted to her (a). But she could not, before the Married Women's Property Act, take administration without the consent of her husband (b), inasmuch as, among other reasons, he was required to enter into the administration bond, which she was incapable of doing. Yet if it could be shown that the husband was abroad, or otherwise incompetent, a stranger might join in the security in his stead (c). In either case the administration was committed to her alone, and not to her jointly with her husband: otherwise, if he should survive her, he would be administrator, contrary to the meaning of the Act (d).

Feme covert:
before
Married
Women's
Property Act,
1882:

Since the commencement of the Married Women's Property Act, 1882, a married woman may take administration without the consent of her husband, and in all respects act in the matter concerning the intestate's estate as if she were a *feme sole* (e).

since the
Married
Women's
Property Act,
1882 (45 & 46
Vict. c. 75).

(z) *In the goods of the Duchess of Orleans*, 1 Sw. & Tr. 253. And see *In the goods of Meatyard*, [1903] P. 125.

(a) Com. Dig. Admor. (B.) 6; *ib.* Admor. (D.).

(b) See *Bubbers v. Harby*, 3 Curt. 50.

(b) See *Bubbers v. Harby*, 3 Curt. 50.

(c) Toller, 91.

(d) *Anon.*, Style, 74; Toller, 91. If it were committed to them jointly during the coverture it might perhaps be good, because, if committed to the wife alone, the husband for such period may act in the administration with or without her assent: Aleyn, 36.

(e) The husband need no longer join in the administration bond: *In the goods of Ayres*, 8 P. D. 168. See also *post*, p. 437.

SECTION III.

Of the Mode of granting Letters of Administration, and the Practice relating thereto, and Form thereof.

Practice as to
grants of
letters of ad-
ministration.

In pursuance of the authority conferred by the Court of Probate Act, 1857, sect. 30 (*f*), a great many rules, orders, and instructions as to grants of letters of administration were made in the year 1862, and subsequently for the regulation of the practice and of the fees of the Court, in respect both of contentious and non-contentious business, and the guidance both of the principal and district registrars. They run to so great a length that it would be impracticable to insert them in full in a treatise such as this, and the reader is therefore referred for them to the books of practice (*g*).

By what in-
strument or
form.

Administration is generally granted by writing under seal. It may also be committed by entry in the registry, without letters *sub sigillo*: but it cannot be granted by parol (*h*).

Time of
granting
letters.

By rule 45, P. R. (Non-contentious Business), "In every case where probate or administration is for the first time applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars, and should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit." In the case of a recent death, if a party swear that he is one of the next of kin, the grant will issue without inquiry as to the knowledge of the other next of kin (*i*), but where there are other next of kin equally entitled thereto the registrars may require proof by affidavit that notice of the application has been given to them (*k*).

Retracting
renunciation.

The practice by rule 44, P. R. (Non-contentious) is, that letters of administration shall not issue until after the expiration of fourteen days from the death of the intestate: unless for special cause (as that the goods would otherwise perish, or the like,) the judge or two of the registrars shall think fit to order them sooner (*l*).

Where a party entitled to the grant of administration has

(*f*) See *ante*, p. 231.

(*g*) Tristram & Coote's Practice, 15th edit. pp. 690—742; Mortimer on Probate Law and Practice, pp. 876—925.

(*h*) *Anon.*, Show. 408, 409; Godolph. Pt. 2, c. 30, s. 5; Toller, 119.

(*i*) *In the goods of Darling*, 3 Hagg. 565.

(*k*) Rule 28, P. R., *ante*, p. 337, note (*w*).

(*l*) 1 Ought. 323, tit. 219, s. 1, note (*a*).

renounced, such renunciation may be retracted before the administration has passed the seal (*m*).

In the case of intestacies where the property of the person dying intestate is of small amount, facility for taking out letters of administration to his estate and effects is given to his widow and children by the Intestates' Widows and Children Act, 1873 (36 & 37 Vict. c. 52).

Intestates' Widows and Children Act, 1873; Stat. 36 & 37 Vict. c. 52:

This Act provides that where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow, or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the Registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said Registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the Registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate and transmit them by post to the said Registrar of the County Court to be by him delivered to the party so applying for the same, without the payment of any fee for the same save as is provided by this Act. (Sect. 1.)

s. 1: Jurisdiction of County Court in small estates.

The Schedule to the Act gives a scale of fees payable according to the value of the estate to be administered. 5s. on £20 or under, and the sum, in addition, of 1s. for every £10 or fraction of £10 beyond £20.

Fees.

The Registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant. (Sect. 2.)

s. 2: Identity of applicant.

(*m*) *West v. Willby*, 3 Phillim. 379. See *M'Donnell v. Prendergast*, 3 Hagg. 212; *ante*, p. 196. Where the widow and children of a bankrupt intestate had renounced administration in favour of the official receiver, on the debts being paid, the Court permitted the renunciations to be retracted, revoked the letters of administration, and made a grant *de bonis non* to the widow and two children jointly: *In the goods of Thacker*, [1900] P. 15. And see *Melville v. Anckettill*, 100 L. T. 863.

s. 3: Registrar to be satisfied as to value of estate. If the Registrar of the County Court has reason to believe that the whole estate and effects, of which the intestate died possessed, exceeds in value one hundred pounds, he shall refuse to proceed with the application, until he is satisfied as to the real value thereof. (Sect. 3.)

s. 4: Powers of Registrars. The Registrars of County Courts may exercise for the purposes of the Act the powers of Commissioners of the Court of Probate. (Sect. 4.)

s. 5: Power to frame rules, orders, &c. for carrying the Act into operation. (Sect. 5.)

s. 6: Duty on administration. Nothing in the Act is to affect any duty payable on letters of administration. (Sect. 6.)

s. 7: The provisions of the Act apply to Ireland. (Sect. 7.)

Ireland. By the Amendment Act passed in the year 1875 (38 & 39 Vict. c. 27), the provisions of the preceding Act were extended to children of poor intestate widows, and it was provided that the amending Act shall be read and construed along with and as part of the preceding Act.

Customs and Excise officers. Provision is made by the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 33, amended by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16, in cases where the whole property, without deduction, does not exceed £500, for application for a grant being made through an authorised officer of customs and excise at certain places (*n*).

SECTION IV.

Of administration to the effects of Intestate Seamen, Marines, and Soldiers; and therewith of personally payable without representation obtained.

28 & 29 Vict. c. 111. By stat. 28 & 29 Vict. c. 111 (Navy and Marines (Property of Deceased) Act, 1865) it is provided: Sects. 3 and 4, that on the death of any person being or having been an officer, seaman, or marine (*o*), or any person being or having been employed in

(*n*) See Tristram & Coote's Prob. Prac., 15th edit., pp. 18—20, 964.

(*o*) By sect. 2, "officer" means a commissioned, warrant, or subordinate officer, or assistant engineer in Her Majesty's naval or marine force: "seaman" or "marine" means a petty officer or seaman, non-commissioned officer of marines, or marine, or any other person forming part, in any capacity, of the complement of any of Her Majesty's naval or marine force (not being an officer within the meaning of this Act) or a petty officer or man of the Royal Naval Reserve or Naval Coast Volunteers.

any of Her Majesty's dockyards or other naval establishment, or in any of the civil departments of the Navy, or entitled to an allowance from the Compassionate Fund, or of any widow entitled to a pension on the establishment of the navy, the amount due by the Admiralty (thereinafter called the residue, shall be disposed of according to the provisions of the Act. Sect. 5, that where the residue exceeds 100*l.* the Admiralty shall pay it to the representative of the deceased. Sect. 6, that where the residue does not exceed 100*l.* representation to the deceased shall not be necessary, but the Admiralty may, if they think fit, require representation to be taken out, and in that case, or if representation is taken out otherwise, shall pay the residue to the representative. Sect. 7, that in the case of a seaman or marine, the Admiralty shall not be bound to pay the residue to his representative if representation has been obtained by a creditor as such, or by any person without complying with the regulations made by Order in Council (Dec. 28, 1865), but shall dispose of the residue under the Act as if representation had not been obtained.

Sect. 8 provides that: "When the residue does not exceed 100*l.*, and representation is not taken out, then, subject to the other provisions of this Act, the Admiralty shall, as soon as may be, dispose of the residue as follows:—(1) They shall, if they think fit, pay the residue to any person showing herself or himself to their satisfaction to be entitled to take out representation to the deceased (otherwise than as a creditor), to the end that the residue may be applied by the person to whom it is so paid in a due course of administration; and the same shall be so applied accordingly (for which application the Admiralty may require such security as they think fit): (2) Or else the Admiralty shall, if they think fit, pay to the persons (if any) beneficially interested in the residue their respective shares thereof: (3) And in cases where the foregoing provisions of the present section do not apply, and the amount of the residue appears to the Admiralty insufficient to cover the expense of representation, the Admiralty shall dispose of the residue in manner prescribed by Order in Council."

Sect. 9 provides that in the case of a seaman or marine the Admiralty shall not make payment to a nominee of the representative or of a person entitled to obtain representation unless in special circumstances it seems to them safe and proper.

deceased seamen, &c.

Ss. 3, 4.

To whom Act applies.

S. 5.

Where residue above 100*l.*

S. 6.

No representation necessary for sums under 100*l.*

S. 7.

Where representation obtained by creditor.

S. 8.

Disposal of residue under 100*l.*, where representation not taken out.

S. 9.

Generally no payment to be made to nominee of representative.

S. 10.

Generally no disposal of residue to be made for three months, except to representative.

S. 11.

Payment of debts by Admiralty.

Sect. 10 provides that the Admiralty shall not dispose of the residue for three months from the receipt of notice of the death except by payment to the representative of the deceased, unless in special circumstances it seems to them safe and proper.

Sect. 11 provides that: "In the case of a seaman or marine where representation is not taken out, the Admiralty shall before disposing of the residue or any part thereof satisfy out of the residue (as far as the same will extend) any debt of the deceased of which they have notice, subject to the following conditions: 1st, That the debt accrued due within three years before the death: 2nd, That payment of it is claimed within two years after the death: 3rd, That the claimant proves the debt to the satisfaction of the Admiralty: 4th, That six months have elapsed from the receipt by the Admiralty of notice of the death, and no person has shown herself or himself to the satisfaction of the Admiralty to be entitled to take out representation to the deceased." And further that a creditor shall be only entitled to obtain payment out of such residue by lodging a claim with the Admiralty and proceeding thereon under the Act (*p*).

S. 13.

S. 15.

Exemption from duty.

Sect. 13 extends the provisions of the Act to unsold effects and money in charge of the Admiralty. Sect. 15 exempts residues under 100*l.* administered under the Act without representation from probate duty, and from stamp duty on the administration bond where the Admiralty requires such bond.

47 & 48 Vict. c. 44.

Extension of meaning of certain words.

By the Naval Pensions Act, 1884 (47 & 48 Vict. c. 44), s. 2, it is provided that all references in the Navy and Marines (Property of Deceased) Act, 1865, to a pension or naval pension, or to money payable by the Admiralty, shall include a naval pension and a Greenwich Hospital pension, gratuity, and allowance within the meaning of the Greenwich Hospital Acts, 1865 to 1883, and any sum due on account of such.

(*p*) By sect. 30 of the Revenue Act, 1889 (52 & 53 Vict. c. 42), it is enacted that (1) If in any case the residue or any part thereof of the estate or effects of a deceased officer, seaman, or marine, having been received by the Admiralty, remains undisposed of or unappropriated for a period of six years and a half from the date of the receipt by the Admiralty by notice of the death, the Admiralty shall, as soon as may be after the expiration of that period, pay or credit the said residue or part to the Greenwich Hospital capital account. Provided that . . . the application under this section of any residue or part of a residue shall not bar any subsequent claim of any person to the same. (2) This section shall be construed as part of the Navy and Marines (Property of Deceased) Act, 1865.

The Naval Prize Act, 1918 (8 & 9 Geo. V. c. 30), s. 4, provides: "Where, in pursuance of the Navy and Marines (Property of Deceased) Act, 1865, on the death of any person being or having been an officer seaman or marine, the amount to the credit of the deceased in the books of the Admiralty in respect of moneys payable by the Admiralty, being an amount not exceeding one hundred pounds, has been disposed of without representation to the deceased being taken out, and subsequently in consequence of an award of prize money or prize bounty there becomes payable to the estate of the deceased an amount less than one hundred pounds, the amount of such money or bounty may be disposed of by the Admiralty if they think fit in accordance with the said Act without requiring representation to the deceased to be taken out, notwithstanding that the amount of the money or bounty is such that when added to the other sums previously paid by the Admiralty, the aggregate exceeds one hundred pounds."

Payment of prize money and prize bounty in certain cases. 8 & 9 Geo. V. c. 30.

The Order in Council of Dec. 28, 1865, amended as regards the duties of the Inspector of Seamen's Wills by Order in Council of Sept. 14, 1915 (St. R. & O. 1915, No. 930), provides, by Sects. XVIII., XIX., XX., XXI., XXII., for the proceedings to be taken in the case of a seaman or marine dying intestate leaving naval assets to which any person makes claim as widow or next of kin. They are similar to the proceedings in the case of the death of a seaman or marine leaving a Will required by Sects. XIII., XIV., XV., XVI., XVII., of the Order in Council, which have been already referred to at greater length (q).

Order in Council of Dec. 28, 1865. Proceedings to be taken on death of seaman intestate.

Sects. XXIV., XXV., XXVI., and XXVII., provide for procedure in the case of officers or any person described in sect. 4 of 28 & 29 Vict. c. 111, dying and leaving naval assets not exceeding 100*l.* where representation is not required or intended to be taken out in England.

Procedure in case of officers, &c., where representation not taken out in England.

In the case of merchant seamen it is provided by 57 & 58 Vict. c. 60, s. 176 (Merchant Shipping Act, 1894), that wages and property of seamen or apprentices not exceeding in value 100*l.*, subject to the provisions thereafter contained and to such deductions as the Board of Trade think proper to allow, may be paid over by them to the persons entitled as therein mentioned, without representation being obtained. And by

57 & 58 Vict. c. 60, s. 176. Where representation to merchant seamen not necessary.

(q) See *ante*, pp. 309—311.

S. 178.

Payment of debts.

Deposits in savings banks for seamen.

Sums not exceeding 50*l.* in respect of pensions of soldiers may be paid without administration or probate.

2 & 3 W. IV. c. 53, s. 19.

Prize money of deceased soldiers.

27 & 28 Vict. c. 36, s. 3.

Commissioners of Chelsea Hospital may authorise the payment of shares not exceeding 50*l.* without representation.

2 & 3 W. IV. c. 53, s. 26.

Claim of prize money by the next of kin of foreigners to

sect. 178 provision is made for payment by the Board of Trade of just claims by creditors (*r*).

By sect. 150 of the Merchant Shipping Act, 1894, all sums due from the Board of Trade to the estate of any deceased person on account of any deposit in a seaman's savings bank shall be paid and applied by the Board of Trade as if they were the property of a deceased seaman received by the Board under the Act.

By the Army Pensions Act, 1830 (11 Geo. IV. & 1 Wm. IV. c. 41), s. 5, as amended by 26 & 27 Vict. c. 57, s. 3, and the Statute Law Revision Act, 1890, the Commissioners of the Chelsea Hospital with respect to pension or prize money, may authorise the agent for pensions, or other proper officer charged with the payment thereof, to pay to any person or persons who shall prove him, her, or themselves, to the satisfaction of such commissioners, to be the next of kin or legal representative, or otherwise legally entitled to any pension, or prize money, due to any deceased officer, non-commissioned officer, &c., such pension, &c., provided the same does not exceed 50*l.*, although no administration or probate shall have been obtained.

By the Army Prize Money Act, 1832 (2 & 3 Wm. IV. c. 53), s. 19, provisions are made as to the payment of prize money to the representatives of deceased soldiers.

Sect. 25 of that Act is repealed and replaced by the Army Prize (Shares of Deceased) Act, 1864 (27 & 28 Vict. c. 36), s. 3, whereby it is provided that the Commissioners of Chelsea Hospital may in any case, if they think fit, authorise their treasurer or secretary to pay the share of prize money (*s*) not exceeding 50*l.* belonging to any deceased officer, soldier, or other person, to or among any person or persons showing themselves entitled to the satisfaction of the Commissioners thereto or to shares thereof without representation being obtained.

By the Army Prize Money Act, 1832 (2 & 3 Wm. IV. c. 53), s. 26, it is enacted, that, in all cases of claim for prize money made by the next of kin of foreigners, who shall have been in the pay of His Majesty as non-commissioned officers

(*r*) See also sect. 29 of the Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), which makes similar provisions in relation to the property of seamen dying on a voyage which does not terminate in the United Kingdom.

(*s*) "Prize money" by sect. 2, includes bounty money, grant, or other allowance of money in the nature of prize or grant in the hands of the Commissioners for distribution.

or soldiers, and who shall have died intestate, it shall be lawful, when such next of kin shall reside out of His Majesty's dominions, for the treasurer or deputy treasurer of the said Hospital for the time being to pay such claims to such next of kin, or any person or persons duly authorised by such next of kin to receive the same, without the production of letters of administration; and, in all cases where such foreign non-commissioned officers or soldiers shall have made Wills, it shall be lawful for the treasurer or deputy treasurer, in like manner, to pay and satisfy such claims to the person or persons who, by inspection of the original Will, or an authenticated copy thereof, shall appear to be entitled thereto, or to such person or persons as he, or she, or they shall duly authorise to receive the same, without requiring the probate.

be paid without administration, &c.

By sect. 28, a creditor taking out administration is entitled only to the payment of the sum due to him at the time.

2 & 3 W. IV. c. 53, s. 28.

By the Pensions and Yeomanry Pay Act, 1884 (47 & 48 Vict. c. 55), s. 4, and the Regimental Debts Act, 1893 (56 & 57 Vict. c. 5), s. 9, special provisions are made for the disposal by the Secretary of State of the residue of the estate of officers, soldiers, or persons subject to military law, where such residue does not exceed 100*l.* and representation is not taken out.

Creditor administrator.

These provisions of the Legislature for the payment of small sums to persons interested in the estates of deceased sailors and soldiers, without representation obtained, have been extended by other statutes to cases of persons interested in certain other small estates. Thus, by the Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 11, it is provided that in the case of the intestacy of a debenture holder, depositor or other claimant entitled to receive any sum not exceeding 50*l.* out of the funds of a Loan Society, entitled to the benefit of the Act, the same may be paid as provided without representation obtained. So by the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 29, in the case of Building Societies under the Act, it is provided that a sum not exceeding 50*l.* due to any member or depositor who dies intestate may be paid as provided without representation obtained. In the case of depositors in Trustee or Post Office Savings Banks, it is provided by the regulations made in accordance with the Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 3 (which supersedes previous similar provisions), for the nomination by depositors not under sixteen

Other cases where representation not necessary.

3 & 4 Vict. c. 110, s. 11.

Members of loan society.

37 & 38 Vict. c. 42, s. 29.

Members of building societies.

Depositors in savings banks.

50 & 51 Vict. c. 40, s. 3.

years of age of any person to whom any sum, not exceeding in the aggregate 100*l.*, payable to such depositor at his decease, may be paid at such decease, and in the absence of nomination for the payment without representation obtained to the persons and in the manner specified by the regulations. Similar provisions for nomination or payment of sums not exceeding 100*l.* without representation obtained have been made in the case of members of Friendly Societies by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 56; in the case of members of registered Trade Unions by 39 & 40 Vict. c. 22, s. 10, as extended by 46 & 47 Vict. c. 47, s. 3; and in the case of members of Industrial and Provident Societies by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27, as amended by the Industrial and Provident Societies (Amendment) Act, 1913 (3 & 4 Geo. V. c. 32) (*t*).

Civil servants. And lastly it is provided by the Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 8, that sums not exceeding 100*l.* due from a public department in respect of any civil pay, superannuation or other allowance, annuity, or gratuity to any deceased person may, if the prescribed public department so direct, but subject to any regulations made by the Treasury, pay over the same as there directed without representation obtained (*u*).

46 & 47 Vict.
c. 47, s. 8.

As to pay-
ment in cer-
tain cases
of sums
belonging to
illegitimate
persons
deceased.

It may here be noted that by 46 & 47 Vict. c. 47, s. 8 (Provident Nominations and Small Intestacies Act, 1883), it is provided: "If a member of any society who is entitled to make a nomination under this Act or the Acts hereby amended (members of Friendly, Industrial and Provident Societies, Trade Unions, and Savings Banks) is illegitimate, and has died intestate and without having made any such nomination subsisting at his death, the directors may pay the sum which such member might have nominated to or among the person or persons who, in the opinion of the majority of them, would

(*t*) Such nominations can only be revoked in the manner provided by the Acts, and not by Will. The effect of the nomination is to take the sum out of the estate of the nominator: *Bennett v. Slater*, [1899] 1 Q. B. 45. See also *Ashby v. Costin*, 21 Q. B. D. 401; and *In re Davies*, [1892] 3 Ch. 63. Policies effected under the Friendly Societies Act, 1875, and, *semble*, under the Friendly Societies Act, 1896, are, however, assignable in the ordinary way, as well as by nomination under the Acts: *Re Griffin*, [1902] 1 Ch. 135. And see *Eccles Provident Industrial Co-operative Society, Ltd. v. Griffiths*, [1912] A. C. 483.

(*u*) See also the Superannuation (Ecclesiastical Commissioners and Queen Anne's Bounty) Act, 1914 (4 & 5 Geo. V. c. 5), s. 7; and the Superannuation Act, 1914 (4 & 5 Geo. V. c. 86), s. 1.

have been entitled thereto if such member had been legitimate, or, if there are no such persons, then the deposits shall be dealt with as the Treasury may direct." So much of this enactment as relates to Industrial and Provident Societies was repealed by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27 (2) of which Act provides that the property of an illegitimate member who leaves no widow, widower, or issue shall be dealt with as the Treasury shall direct.

It has not been thought necessary in this Work to set out the above enactments at any greater length; for further information the reader should consult the Acts cited.

Order 22, r. 18A of the Rules of the Supreme Court and the Supreme Court Funds Rules, 1915, r. 62, contain provisions for the payment out of a fund or of a share of a fund in Court not exceeding 100*l.* to the next of kin of a deceased person who has died intestate in cases where the assets of the deceased, including the fund or share of it to which his estate is entitled, do not exceed the value of 100*l.*, and no administration has been taken out.

Payment out
of funds
in Court.

CHAPTER THE THIRD.

OF SPECIAL AND LIMITED ADMINISTRATION.

SECTION I.

Of Administrations cum testamento annexo.

Instances of
quasi intestacy.

Administration with the
Will annexed:
administration *de bonis non*.

HITHERTO the subject has been confined to cases of complete intestacy. But it often happens, that the deceased, although he makes a Will, appoints no executor, or else the appointment fails: in either of which events, he is said to die *quasi intestatus* (*a*). The appointment of executor fails: 1. Where the person appointed refuses to act. 2. Where the person appointed dies before the testator, or before he has proved the Will; or where, from any of the causes specified in a former part of this Work, he is incapable of acting. 3. Where the executor dies intestate, after having proved the Will, but before he has administered all the estate of the deceased. In all these cases, as well as where no executor is appointed, the Court must grant an administration, which is called administration with the Will annexed (*b*); and in the last instance it is also called administration *de bonis non* (*c*). The office of an administrator differs little from that of an executor (*d*): and it is plain that the Will to which it is annexed must be similarly proved, as though probate were taken of it by an executor (*e*).

(*a*) 2 Inst. 397.

(*b*) See *ante*, Pt. I. Bk. III. Ch. iv. p. 174 *et seq.* and notes. But the Court will not grant administration with the Will annexed to the residuary legatee with the consent of the executor. It can only do so on the renunciation of probate by the executor, or, after citation has been served on him, upon his non-appearance within the prescribed time: *Garrard v. Garrard*, L. R. 2 P. & D. 238.

(*c*) Com. Dig. Administrator (B. 1). Administration *de bonis non* must also be granted, whenever an administrator dies before he has administered all the effects. See *post*, sect. 2, p. 388 *et seq.*

(*d*) 2 Black. Comm. 535.

(*e*) Such administration must also be granted, if one of two executors proves the Will and dies intestate, and the other renounces. See *ante*, pp. 176, 199; Com. Dig. Administrator (B. 1). So if a man name

It is obvious that many of the cases above contemplated are not within the statute of administration, 21 Hen. VIII. c. 5 (f), which provides only for intestacy, and the refusal of the appointed executor: Consequently in such instances the Court is left to the exercise of its discretion in the choice of an administrator, according to its own practice: and no person has such a legal right to preference as can be enforced by application to the Common Law Courts (g).

Cases not within the statute of administration.

The rule of practice in the Ecclesiastical Court, in a case where the grant of administration was not within the statute, was to consider which of the claimants had the greatest interest in the effects of the deceased, and decree the administration accordingly, if there were no peculiar circumstances (h). Hence, in all cases where no executor is appointed, or the appointed executor fails to represent the testator, the residuary legatee, if there be one, is preferred to the next of kin, and entitled to administration *cum testamento annexo* (i). And so strong has been the effort of the Courts that the right of

Practice to grant administration to him who has the greatest interest:

residuary legatee preferred to next of kin:

the executor of B. to be his executor, and die in the lifetime of B.; for until B.'s death, he is in effect intestate: *Graysbrook v. Fox*, 1 Plowd. 279, 281. Or if a man name an executor to have authority after a year from his death; for during the year he is without an executor: 1 Plowd. 279, 281. And it seems that in all cases where a man makes his testament and executors, and there is a mesne time in which the executors cannot or will not execute the office, the Court ought in the meantime to grant administration: *Graysbrook v. Fox*, 1 Plowd. 279.

(f) See *ante*, p. 319.

(g) *Rex v. Bettesworth*, 2 Stra. 956; *In the goods of Ewing*, 6 P. D. 19, 25.

(h) *Wetdrill v. Wright*, 2 Phillim. 243, 248. In fact, in all cases, whether within the statute or not (with the exception, according to the old practice, of the single instance of administration to a wife's effects, whose husband has died after her, but before her estate is administered, see *ante*, p. 323), the right of administration follows the right to the property: *In the goods of Gill*, 1 Hagg. 341. In a contest for administration, with the Will annexed, the Court preferred the sister of the testator to the widow, as it appeared that the sister as a legatee had the larger interest in the property to be distributed: *In the goods of Homan*, 9 P. D. 61. See *ante*, p. 325, as to the grant being made to the persons having an interest under the Will of a married woman in preference to her husband. See also *In the goods of Martindale*, 1 Sw. & Tr. 8; *In the goods of Pine*, L. R. 1 P. & D. 388; *In the goods of Maychell*, 4 P. D. 74.

(i) The residuary legatee, it is said, is the testator's choice; he is the next person in his election to the executor: *Atkinson v. Barnard*, 2 Phillim. 318. If there are several entitled to the residue, administration may be granted to any of them: *Taylor v. Shore*, T. Jones, 162; Com. Dig. Administrator (B. 6). See *Dampier v. Colson*, 2 Phillim. 54; *In the goods of Stainton*, 2 P. & D. 212; *In the estate of Lupton*, [1905] P. 321; and see *ante*, p. 161.

administration should follow the right of property, that although in the case of the appointed executor's renunciation, the letter of the statute expressly directs the Ordinary to grant administration to the next of kin, yet the spirit of the Act has been held, both by common lawyers and civilians, to exclude the next of kin where there is a residuary legatee; on the ground that in such case the next of kin have no interest (*j*). "The reason," said the Court, in *Thomas v. Butler* (*k*), "that the statute 21 Hen. VIII. required that administration should be granted to the next of kin was, upon the presumption that the intestate intended to prefer him: But now the presumption is here taken away, the *residuum* being disposed of to another: and to what purpose should the next of kin have it, when no benefit can accrue to him by it? and it is reasonable that he should have the management of the estate who is to have what remains of it after the debts and legacies paid."

Land Transfer Act, 1897.
Residuary devisee
equally entitled with
residuary legatee.

As the result of the provisions of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) s. 2 (3), where the deceased died on or since January 1st, 1898, the residuary devisee is equally entitled to the grant of administration *cum testamento annexo* with the residuary legatee (*l*).

Residuary legatee
preferred even where
there is no residue, or
where he is
only trustee:

So the residuary legatee or residuary devisee (in cases coming within the Land Transfer Act, 1897), even when there is no present prospect of any residue, is entitled to administration in preference as well to the next of kin (*m*), as also to legatees and annuitants (*n*). So he is entitled, though only residuary legatee in trust. The ordinary practice where an executor fails to represent a testator is, in the absence of special circumstances, to grant administration with the Will annexed to the residuary

(*j*) *Taylor v. Diplock*, 2 Phillim. 276, 277; *In the goods of Gill*, 1 Hagg. 341, 342. See also *ante*, p. 348.

(*k*) 1 Ventr. 219.

(*l*) Where there is a residuary devisee in trust, he should be "cleared off" before a grant can be made to a residuary legatee, and *vice versa*: Instructions under Land Transfer Act, 1897, No. 3. If there is no executor or residuary legatee, the grant should not be made to the next of kin without "clearing off" the residuary devisee. If there is no executor or residuary devisee, the grant is not made to the heir-at-law without "clearing off" the residuary legatee: *ibid.* No. 5. A grant is not made to the representatives of a deceased residuary legatee without "clearing off" the residuary devisee: *ibid.* No. 6.

(*m*) *Thomas v. Butler*, 1 Ventr. 219; Treat. on Eq. B. 4, p. 2, c. 1, s. 6; for, being once out of the statute upon the construction of the Will, there is nothing *ex post facto* can bring him within it: 1 Ventr. 219.

(*n*) *Atkinson v. Barnard*, 2 Phillim. 316.

legatee or devisee in trust, if any; and failing such residuary legatee or devisee in trust, then to grant the same, not to his or her representative, but to such person or persons as have the beneficial interest in the residuary estate under the Will (o); and where a testatrix bequeathed the residue of her property to a Miss Catherine Headon, to be disposed of as she should think fit, at her discretion, for the benefit of the convent of St. Edward, Blandford Square, and the executor of the Will and Catherine Headon both died in the testatrix's lifetime, the Court made a grant of administration with the Will annexed to the Rev. Mother of the convent as residuary legatee on proof of the permanence of the Institution and of the fitness of the Rev. Mother, having regard to her powers, to receive and apply the legacy (p). The Court will in no case grant administration to substituted trustees as such, without the consent of all parties beneficially interested, until the trust properties are actually vested in such substituted trustees (q).

However, the next of kin has, subject to the rights of the heir-at-law in cases coming within the operation of the Land Transfer Act, 1897, a *primâ facie* right, and therefore, where a party claims as, or derivatively from, a residuary legatee, or residuary devisee, in cases coming within the Land Transfer Act, 1897, the burden of proof lies on such party (r). Hence, where the husband appointed his wife executrix and residuary legatee, and he and his wife were drowned in the same ship, the Court granted administration to the next of kin of the husband, on the ground that the next of kin of the wife had not proved her survivorship (s).

but next of
kin have a
primâ facie
right.

(o) *Hutchinson v. Lambert*, 3 Add. 27, decided by Sir John Nicholl in 1825. See, however, the earlier cases to the contrary of *Coussmaker v. Chamberlayne*, 2 Cas. temp. Lee, 243; *Boddicott v. Dalzeel*, *ibid.* 294; *Fawkener v. Jordan*, *ibid.* 327, all decided by Sir George Lee in 1755, and which must, it is submitted, be considered as overruled; and see *post*, p. 380.

(p) *In the goods of McAuliffe*, [1895] P. 290; following *Walsh v. Gladstone*, 1 Ph. 290.

(q) *Cresswell v. Cresswell*, 2 Add. 342. And see *Woodfall v. Arbuthnot*, 3 P. & D. 108.

(r) The next of kin, as to personalty, stand in the same position as the heir-at-law as to realty: *Underwood v. Wing*, 4 De G. M. & G. 633.

(s) *Taylor v. Diplock*, 2 Phillim. 261; *In the goods of Selwyn*, 3 Hagg. 748; *Underwood v. Wing*, 4 De G. M. & G. 633; *S. C. Wing v. Angrove*, 8 H. of L. 183; *In the goods of Carmichael*, 32 L. J. P. & M. 70; *In the goods of Wheeler*, 31 L. J. P. & M. 40; *In the goods of Alston*, [1892] P. 142. See also *In the estate of Roby*, [1913] P. 6; and *post*, Pt. III. Bk. III. Ch. II. § V., where the question of

The representative of the residuary legatee has the same right.

Where the residuary legatee survives the testator, and has a *beneficial* interest, his representative has the same right to administration *cum testamento annexo*, as the residuary legatee himself, and is therefore entitled to administration in preference to the next of kin (*t*), or to legatees (*u*). Thus, if an executor be also residuary legatee, and die before probate, or intestate, before he has fully administered the estate, administration *cum testamento annexo* shall be granted to his personal representative, and not to the next of kin of the first testator (*x*). Hence also, though, generally speaking, if a feme covert executrix dies intestate, her husband cannot take out administration *de bonis non* to the first testator, yet if she be also residuary legatee, he may do so (*y*). But, as already mentioned, where the residuary legatee is a mere trustee, without any beneficial interest, it is the ordinary rule of practice, in the absence of special circumstances, upon his death to grant the administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate (*z*).

Although practice is to grant administration to residuary legatee, he has no legal right to grant.

Although it was the practice of the Spiritual Court, grounded on the principle above stated, to grant administration to the residuary legatee, yet, as he had no legal right to it under the statute, the Court was not *bound* (as in the case of the sole next of kin of a complete intestate) to grant it to him. Thus, where the testator appointed two executors by his Will, and left the residue of his estate to his son, the executors renounced, and the son moved for a *mandamus* to obtain administration *cum testamento annexo*: But the Court refused to grant the writ, on the ground that none of the statutes mentioned the residuary legatee: and Lord Hardwicke adverted to a case in Chancery, before Lord Macclesfield, between *Wheeler* and the *Archbishop*

survivorship among persons whose death is occasioned by the same cause is more fully considered.

(*t*) *Wetdrill v. Wright*, 2 Phillim. 243. See also *Thomas v. Baker*, 1 Cas. temp. Lee, 341.

(*u*) *Re Thirlwall*, 6 Notes of Cas. 44.

(*x*) *Ysted v. Stanley*, Dyer, 372 *a*, *ex relatione* Doctor Drury (judge of the Prerogative Court); Went. Off. Ex. 82, 14th edit.; Godolph. Pt. 1, c. 20, s. 2. Where the testator made his wife residuary legatee for life, and substituted his daughter after her death, and the widow proved the Will, and then both she and her daughter died; it was held that the personal representative of the daughter had a right to administration *cum testamento annexo*, in preference to the representative of the mother: *Wetdrill v. Wright*, 2 Phillim. 243.

(*y*) *Richardson v. Seise*, 12 Mod. 306; *Rous v. Noble*, 2 Vern. 249.

(*z*) *Hutchinson v. Lambert*, 3 Add. 27; *Coussmaker v. Chamberlayne*, 2 Cas. temp. Lee, 243.

of *Canterbury*, where it was held that this sort of administration is not within the statute (a).

If the residuary legatee declines, it is usual to grant administration *cum testamento annexo* to the next of kin: But it is clear, that when he has no interest he may be excluded, and the administration granted to a person who has an interest in the effects, *e.g.*, a creditor (b). In *Furlonger v. Cox* (c), the deceased left a widow and a son; the widow was sole executrix and universal legatee: She renounced probate, and the son contended for the administration against a creditor (d); the Court held that the son was excluded, the estate being insolvent, and gave the administration to the creditor (e).

If the residuary legatee declines administration usually granted to next of kin :

but he may be excluded if he has no interest.

If the executor fails to take probate, and there is no residuary legatee, subject to the rights of the heir-at-law in cases coming within the Land Transfer Act, 1897, the next of kin are entitled to administration *cum testamento annexo* (f). If the

If there is no residuary legatee, the next of kin is entitled; if the next of

(a) *Rex v. Bettsworth*, 2 Stra. 956; *In the goods of Ewing*, 6 P. D. 19, 25. But where the same person is both next of kin and residuary legatee, neither law nor practice will warrant a refusal to grant administration *cum testamento annexo* to such person, when the executors renounce: *Linthwaite v. Galloway*, 2 Cas. temp. Lee, 414.

(b) *West v. Willby*, 3 Phillim. 381. See *Mayhew v. Newstead*, 1 Curt. 593, in which case the executor and residuary legatee having assigned his interest to trustees for the benefit of his creditors, administration with the Will annexed was granted to two of the trustees, he having been first cited.

(c) Prerog. Jan. 1811; cited by Sir John Nicholl, in 3 Phillim. 381.

(d) But, unless in cases where the next of kin has no interest in the property, a creditor cannot be allowed to contest the right to administration; as when the fact of the insolvency is disputed: *ante*, p. 363, n. (l). And a residuary legatee, who has renounced, may retract his renunciation and claim the administration in preference to a creditor, though the estate is alleged to be deeply insolvent: *In the goods of Waters*, 2 Robert. 142.

(e) Lord Mansfield, in *The Archbishop of Canterbury v. House*, Cowp. 140, said that "no next of kin ever struggled for the administration of an insolvent estate with an honest view."

(f) *Kooystra v. Buyskes*, 3 Phillim. 531. Administration with a Will annexed, in which there was no executor nor residuary legatee, was decreed to two aunts of the deceased, legatees in the Will, and daughters of the next of kin, a grandmother, she being nearly ninety years of age, and incapable: *Re Hinckley*, 1 Hagg. 477. Where a sole executrix and universal legatee, being the illegitimate daughter of the testatrix, had not been heard of for forty years, the Court granted administration with the Will annexed to the representative of the next of kin of the testatrix, on proof that the executrix had been cited by advertisement, and that the Solicitor to the Treasury did not intend to apply for administration, and subject to administration to the next of kin being taken out: *In the goods of Ley*, [1892] P. 6. And where there were no known relatives, and no residuary legatee appointed, having regard to the special circumstances of the case, administration with the Will annexed, limited to the estate disposed

kin decline, it may be granted to a legatee or creditor, upon notice.

What citations are necessary before grants *cum testamento annexo*.

next of kin decline it, such administration may be granted to a legatee (*g*) or to a creditor (*h*); but notice must be given of the application of the legatee or creditor to the next of kin (*i*).

In all these cases, where a party has a prior title to a grant, he must be cited before administration is committed to any other person (*k*). Therefore the executor, if there be one, must be cited before a grant to a residuary legatee (*l*), a residuary legatee before a grant to a specific legatee, and so on, through all the gradations of priority. So if there is a testamentary disposition without an executor, it has been laid down that the party in whose favour the disposition is made, must cite the next of kin, before he can have administration *cum testamento annexo* (*m*), and now where there is real estate and the testator dies after the commencement of the Land Transfer Act, 1897, the heir-at-law must also be cited.

The Court will grant administration, with the Will annexed, to one of two universal legatees, a decree with intimation having

of by the Will, was granted to a stranger: *In the goods of Jackson*, [1892] P. 257; and see *In the goods of Moffatt*, [1900] P. 152.

(*g*) If there be a legatee for life and a legatee substituted, the practice is to prefer the former. But the Court will depart from its practice, when, were it to be followed, a question of construction of the Will would, in effect, be determined, and will make such a grant as will leave the question open: *Brown v. Nicholls*, 2 Robert. 399.

(*h*) *Kooistra v. Buyskes*, 3 Phillim. 531; *Snape v. Webb*, 2 Cas. temp. Lee, 411. See also *In the goods of Cosh*, 25 T. L. R. 785.

(*i*) 3 Phillim. 531; Com. Dig. Administrator (B. 6). See also *Woolley v. Green*, 3 Phillim. 314.

(*k*) *In the goods of Barker*, 1 Curt. 592; *ante*, p. 363.

(*l*) If there be two executors, and one alone has proved the Will, power being reserved to the other, both the executors must be cited: *In the goods of Leach*, Dea. & Sw. 294. See *Le Briton v. Le Quesne*, 2 Cas. temp. Lee, 261, as to the citation of an executor who has already proved the Will in a Court out of the jurisdiction, in a case where administration is required by the residuary legatee, in order to recover a debt within the jurisdiction.

(*m*) 3 Bac. Abr. 41, tit. Executors (E. 8). Accordingly in a case where an application was made for a grant of administration with the Will annexed to the sole legatee, on an affidavit that the testator died possessed of no other property than that specifically described in the Will, Sir Cresswell Cresswell held, that the next of kin ought to have been cited, but appears to have given the applicant his option of taking administration limited to the property disposed of by the Will: *In the goods of Watson*, 1 Sw. & Tr. 110. On a subsequent occasion, when this case was cited, the learned judge said that it was an exceptional case, and that the general rule was against such a grant, which should not be made unless some very strong reason be given: *In the goods of Watts*, 1 Sw. & Tr. 538. See, however, *In the goods of Baldwin*, [1903] P. 61.

issued in the name of the other, who is since dead (*n*). So administration, with the Will annexed, in which there was no executor, may be granted to one of two legatees, a decree with intimation having issued in their joint names against a residuary legatee (*o*).

Even where the husband consents, the Court will refuse to grant probate to the executor named in the Will of a married woman, who dies domiciled abroad; but, with such consent, will make a general grant of administration with the Will annexed to the person named in the Will as executor (*p*).

When the executor resides out of the jurisdiction, administration *cum testamento annexo* may be granted to another person under a letter of attorney from the executor for his use and benefit (*q*). A grant to an attorney of an executor has not by the executor's death, when he has appointed executors, been deemed to break the chain of representation, as a Will proved by the attorney of an executor is the same thing as if actually proved by the executor himself (*r*). Again, the letter of attorney is revocable; and when the executor revokes it and desires probate, the Court is bound to grant it to him (*s*).

Administra-
tion to attor-
ney of execu-
tor:

its effect:

it is revocable.

On one occasion, administration, with the Will annexed, had been granted for the use and benefit of the executor, then at sea, to his attorney: The executor having returned to England, and being desirous of probate, and the administration with the Will annexed having been brought in by the attorney (with the usual affidavit, "that no action at law, or suit in equity, had been brought by or against him as administrator"), had been sworn as executor: And he prayed that the administration should be declared to have *ceased and expired*, and that probate should be granted to him: The application, in respect to the letters of administration, was objected to in the Registry, on the ground that in some similar cases the administration had been expressly revoked: In support of the motion, it was urged

Consequence
of the return
of the execu-
tor.

(*n*) *Law v. Campbell*, 1 Hagg. 55.

(*o*) *Pickering v. Pickering*, 1 Hagg. 480. See *post*, p. 436.

(*p*) *In the goods of Vannini*, [1901] P. 330; commenting on and explaining *In the goods of Hallyburton*, L. R. 1 P. & D. 90; and *In the goods of Tréfond*, [1899] P. 247.

(*q*) See *ante*, p. 350; *In the goods of Barker*, [1891] P. 251.

(*r*) *In the goods of Bayard*, 1 Robert. 768; *In the goods of Murguia*, 9 P. D. 236. And see *ante*, p. 175. So also as to grants for the use and benefit of an executor during his incapacity: *In the goods of Frengley*, [1915] 2 Ir. R. 1.

(*s*) *Pipon v. Wallis*, 1 Cas. temp. Lee, 402.

that the administration, having been rightly granted, ought not to be revoked: A revocation which was unnecessary might possibly be injurious; for it might render some of the administrator's acts void: and would certainly be inconvenient: for the probate would be considered at the Stamp Office as an original, and consequently probate duty required to be paid as for an original grant, and the duty, already paid on the administration, could only be recovered upon a special application to the commissioners, supported by affidavit: whereas, if the administration were declared to have *ceased and expired*, the probate would pass at the Stamp Office upon a free stamp: The Court (Sir John Nicholl) declared the administration *cum testamento annexo* to have *ceased and expired*; and directed that, in future, grants, *durante absentia*, to attorneys, should be limited "for the use and benefit of resident at , and until the executor (or the party entitled to the administration) should duly apply for, and obtain, probate or administration" (t).

Consequence
of the death
of the exe-
cutor.

On the death of the executor the letters of administration to his attorney cease to be of any force; and therefore the administrator cannot make a good title, if he sells leasehold property of the deceased, unless he can warrant to the purchaser that the executor is alive (u).

Where an executor was incapacitated through illness, the Court made a grant of administration with the Will annexed to a residuary legatee for life for the use and benefit of the executor till his recovery (x).

The executor
is not allowed
to take ad-
ministration
*cum testa-
mento annexo*.

It may here be observed, that a person who is entitled to probate as executor will not as a general rule be allowed to take out administration *cum testamento annexo* notwithstanding the inconvenient effect which the taking probate may in some cases have, by reason of continuing the chain of representation to some other party whose executor the testator happens to be. For if a person be entitled to a grant in a superior character,

(t) *In the goods of Cassidy*, 4 Hagg. 360; *Webb v. Kirby*, 7 De G. M. & G. 381; and see *Re Rendall*, [1901] 1 Ch. 230; *Hewson v. Shelley*, [1914] 2 Ch. 13, 43. As to the effect of the death of the executor, see *Suwerkrop v. Day*, 8 A. & E. 624.

(u) *Webb v. Kirby*, 7 De G. M. & G. 376, reversing the decision of the V.-C., 3 Sm. & G. 333.

(x) *In the goods of Ponsonby*, [1895] P. 287. And see *In the goods of Hunt*, [1896] P. 288, where a limited company having been appointed trustees and executors, the Court granted administration to the general manager as their nominee.

the Court will not make that grant to him in an inferior character (*y*). Accordingly, by rule 50, P. R. 1862 (Non-contentious), “No person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character (*z*).”

A person entitled to the grant in a superior character not to take it in an inferior.

SECTION II.

Of Administration de bonis non.

This subject may be treated with reference, 1st, to the death of an executor: 2ndly, to the death of an administrator.

1. With respect to the consequences of the death of an executor. If a sole executor happens to die, without having proved the Will, the executorship, as there has before been occasion to observe (*a*), is not transmissible to his executor, but is wholly determined, and administration *cum testamento annexo* must be committed to the person entitled, according to the rules pointed out in the preceding section.

1. Consequences of the death of an executor:

When the administration is granted under such circumstances, although the executor may have administered in part by disposing of the testator's effects, &c., yet the administration shall not be *de bonis non administratis*, but an immediate administration: because, although the acts done by the executor are good (*b*), the administering is an act *in pais*, of which the Court of Probate cannot take notice (*c*).

If one of two executors dies before, or after, probate, no interest is transmissible to his own executor, but the whole representation survives to his companion (*d*). Where such surviving executor, or where a sole executor, dies after probate,

(*y*) *In the goods of Bullock*, 1 Robert. 275; *In the goods of Richardson*, 1 Sw. & Tr. 515; *In the goods of Morrison*, 2 Sw. & Tr. 129; but see *In the estate of Toscani*, [1912] P. 1.

(*z*) As to the construction of this rule, see *In the goods of Loftus*, 3 Sw. & Tr. 307, which decides that it is competent for the Court to treat the rule as intended for the general guidance of the business in the Registry, and capable of modification by the Court, if sufficient reason can be shown for departure from it. And see also *In the goods of Lady Catherine Somerset*, 1 P. & D. 350; and *In the estate of Toscani*, [1912] P. 1.

(*a*) *Ante*, p. 220.

(*b*) *Ante*, p. 214.

(*c*) *Wankford v. Wankford*, 1 Salk. 308, by Holt, C. J.

(*d*) *Ante*, p. 176.

where sole or surviving executor dies after probate intestate, there must be administration *de bonis non* :

so where the executor appoints his own executor if the original Will was not proved in this country :

where estate administered except as to one legacy :

so where one of several executors proves, and the rest renounce, and he who has proved dies :

having made a Will, appointing his own executor, the entire representation of the original testator will be transmitted to him (e). But where such surviving executor, or sole executor, dies after probate, intestate, then no interest is transmissible to his administrator (f): but administration of another sort becomes necessary, which is called administration *de bonis non*, that is, of the goods of the original testator left unadministered by the former executor (g).

So if the original testator dies abroad, or in the colonies, and his executor proves the Will there, and then dies, having made his Will and appointed his own executor, who proves the latter Will in the Probate Division here, it has been held, that the executor of the executor does not represent the first testator; and that in order to constitute him personal representative here, administration *de bonis non* must be obtained in the Probate Court in this country (h).

In a case where the estate of a testatrix had been administered except as to one legacy, the Court granted administration with Will annexed *de bonis non* to the legatee without requiring the representative of the executor, or residuary legatees who could not be found except at great expense, to be cited, but the Court required justifying security (i). And upon an application for a grant of administration *de bonis non*, where it appeared that the residuary legatee, resident abroad, had had notice by letter, and that he had no beneficial interest, there being actually no residue, the grant was made to a specific legatee, without requiring the residuary legatee to be cited or to renounce, but subject to the filing of an affidavit verifying the finding of the chief clerk's certificate that after payment of the debts and legacies there would be no residue (k).

Again, before the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), if there were several executors, and one alone proved the Will, and the rest renounced, upon the death of him who had proved, no interest was transmissible to his executor; but the representation survived to the co-executors, who might

(e) *Ante*, pp. 174, 176. The principle is the same, though the original Probate was limited: *In the goods of Beer*, 2 Robert. 349.

(f) *Ante*, p. 174.

(g) *Ante*, p. 174; *Tingrey v. Brown*, 1 Bos. & Pull. 310.

(h) *Twyford v. Trail*, 7 Sim. 92; *Fordler v. Richards*, 5 Russ. O. R. 39; *In the goods of Gaynor*, L. R. 1 P. & D. 723.

(i) *In the goods of King*, 8 P. D. 162.

(k) *In the goods of Wilde*, 13 P. D. 1.

retract their former renunciation, and assume the executorship (*l*); but if they persisted in refusing to act, administration *de bonis non* became necessary.

Now by the 79th section of that statute, "where any person after the commencement of this Act renounces probate of the Will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor." It has been held that this section has not abrogated the old practice whereby the Court in a proper case has allowed a co-executor to retract his renunciation if his so doing appeared to be clearly for the benefit of the estate (*m*).

Stat. 20 & 21
Vict. c. 77,
s. 79.

This administrator *de bonis non* will, when appointed, be the only representative of the party originally deceased. Such administration will evidently be committed *cum testamento annexo*, and will be granted to the person entitled according to the general principles already developed in cases of administration *cum testamento annexo*. In many instances, it is obvious, he will be a different person from the representative of the deceased executor; but if the executor were also beneficially residuary legatee, his representative will likewise be entitled to the administration *de bonis non* to the original testator (*n*).

Who is
entitled to
administra-
tion *de bonis
non cum
testamento
annexo*.

Where administration *durante minoritate* was in the first instance granted to the mother of an infant, a part residuary legatee, on the renunciation of the executor: The infant died: By his death the administration ceased, and the mother became entitled, as widow, to the lapsed residue jointly with another infant: Under these circumstances, administration *de bonis non*, with the Will annexed, was decreed to her (*o*).

It has been said, upon the authority of *Limmer v. Every*, as reported by Croke (*p*), that where an executor dies, having appointed an executor, who is a minor, and an administrator *durante minoritate* is appointed, he has no authority to intermeddle with the effects of the original testator, but an adminis-

Administra-
tion *de bonis
non* not neces-
sary when
there is an
administra-
tion *durante
minoritate* of
an executor of
an executor.

(*l*) *Arnold v. Blencowe*, 1 Cox, 426; *ante*, pp. 176, 199.

(*m*) *In the goods of Stiles*, [1898] P. 12. See also *ante*, p. 199.

(*n*) *Ante*, p. 380.

(*o*) *Akers v. Dupuy*, 1 Hag. 473.

(*p*) *Cro. Eliz.* 211.

tration *de bonis non* must be granted (*q*). However, as the case is reported by Leonard (*r*), the point decided was merely that such an administrator should sue as administrator of the first testator: And in a later case (*s*), it was held, on an application for a prohibition, that although an administrator of an executor is not an administrator to the first testator, yet an administrator *durante minore etate* is *in loco executoris*, and may be sued as the executor of an executor may (*t*).

2. Consequences of the death of an administrator, or of one entitled to administration:

2ndly, With respect to the consequences of the death of an administrator, or of one entitled to administration. It has already been shown, that if a party who, as next of kin to the intestate at the time of his death, was entitled to administration, dies before letters of administration are obtained, his representative is entitled to the grant in preference to one who has no beneficial interest in the effects, although he may have become next of kin at the time the grant is required (*u*).

of one of several administrators:

Where administration has been granted to two and one dies, the survivor will be sole administrator (*x*), for it is not like a letter of attorney to two, where by the death of one, the authority ceases, but it is an office analogous to that of executor, which survives (*y*). Upon the death of such surviving administrator, or of a sole administrator, in order to effect a representation of the first intestate, the Court, whether the administrator died testate or intestate, must appoint an administrator *de bonis non*; for an administrator is merely the officer of the Court, prescribed to it by Act of Parliament, in whom the deceased has reposed no trust; and therefore on the death of the administrator, no authority can be transmitted by him to his executor or administrator, but it results to the Court to appoint another officer (*z*).

of a surviving or sole administrator.

(*q*) 3 Bac. Abr. 13, Exors. (B. 1); Toller, 118.

(*r*) 4 Leon, 58, *nomine Lámver v. Evorie*.

(*s*) *Anon.*, 1 Freem. 288.

(*t*) See also *Norton v. Molyneux*, Hob. 246; and Mr. Smirke's note in his edition of Freeman, p. 288; and see, as to the effect of a grant for the use and benefit of the executrix during her incapacity: *In the goods of Frengley*, [1915] 2 Ir. R. 1.

(*u*) *Ante*, pp. 348, 349.

(*x*) *Hudson v. Hudson*, Cas. temp. Talb. 127, decided by Lord Talbot, after hearing civilians; *Eyre v. Lady Shaftsbury*, 2 P. Wms. 121; Com. Dig. Administrator (B. 7); *Jacomb v. Harwood*, 2 Ves. Sen. 268.

(*y*) *Adam v. Buckland*, 2 Vern. 514; 3 Bac. Abr. 56, tit. Executors (G.).

(*z*) 2 Black. Comm. 506. Where the original administrator of a deceased intestate could not be found, and was believed to be dead,

It remains to be considered who, upon the death of the administrator, is entitled to be appointed administrator *de bonis non* to the original intestate.

Who is entitled to administration *de bonis non* on the death of the original administrator :

The Ecclesiastical Judges have on several occasions laid down, that in all that regards the obligation of the statutes of administration on the Court, in the grant of administration, no distinction exists between an original and a *de bonis non* administration (*a*). And in *Kindleside v. Cleaver*, the Common Law Judges Delegates expressed the same opinion (*b*). Accordingly, upon the death of an original administrator, a person who was next of kin at the time of the death of the intestate, has been regarded as entitled, under the statute of Hen. VIII., to the *de bonis non* grant, in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death; and hence, in the case where a husband takes out administration to his wife, and dies, the Spiritual Courts for a long time considered themselves bound by the statute (in contravention of convenience, and of the general principle that the right of administration shall follow the right of property), to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death, as having an absolute statutable right; although the beneficial interest in her effects be in the representative of the husband (*c*). But the practice has been altered in this respect: And the rule now established, on the principle that the grant ought to follow the interest, is, that the administration will be granted to the representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest (*d*).

Rule now established.

Again, it has been held that the statutes only regard *the next of kin at the time of the death* of the intestate, and not the next of kin at the time a second grant is wanted; and therefore

the Court granted administration *de bonis non* to one of the next of kin, on her affidavit that she believed the original administrator to be dead or beyond the seas: *In the estate of Saker*, [1909] P. 233. And see *In the estate of French*, [1910] P. 169.

(*a*) Dr. Bettesworth, in *Kindleside v. Cleaver*, 1 Hagg. 345; Dr. Hay, in *Walton v. Jacobson*, 1 Hagg. 346.

(*b*) See 2 Hagg. Appendix, 170.

(*c*) *Kindleside v. Cleaver*, 1 Hagg. 345. See *ante*, pp. 323, 324. Yet instances may be found, where, notwithstanding the statute, the Court have denied administration to the next of kin, on the ground of his having no interest. See *Young v. Pierce*, 1 Freem. 496; *ante*, p. 348.

(*d*) *Ante*, p. 324.

Administra-
tion *de bonis*
non granted
to the exe-
cutor of
deceased ad-
ministrator
having the
greatest
interest in
the effects.

when the next of kin, who were so at the time of the death, are dead, the Court has power, independent of the statute, to grant administration *de bonis non*, at its discretion according to its own rules (e). In the guidance of which discretion, the established principle is (as in the case of administration *cum testamento annexo*), that if there are no peculiar circumstances, the administration shall be committed to him who has the greatest interest in the effects of the original intestate (f). Thus, in *Savage v. Blythe* (g), the intestate died, leaving a brother and several nephews and nieces: Administration was granted to the brother, and at the end of the year he distributed, taking the securities of the deceased upon himself: he afterwards died, leaving the securities due to the original deceased outstanding; and having made a Will, and appointed an executor: a decree was taken out against the nephews to show cause why administration *de bonis non* should not be granted to the executor of the brother administrator: The nephews appeared, and prayed administration as next of kin under the statute: But Sir Wm. Wynne held that the statutable right was confined to the next of kin at the time of the death, and granted the administration *de bonis non* to the executor of the deceased administrator, on the ground that the interest was clearly in him. In the subsequent case of *Almes v. Almes* (h), the same Judge again granted similar administration, under nearly the same circumstances, upon the same grounds; and mentioned the case of *Lovegrove v. Lewis* (i), decided by Sir George Hay, and affirmed by the Delegates, where the administration was granted to the executor of the original administrator, to the exclusion of those who were next of kin at the time of the grant (k).

The proposition, however, that if all who were next of kin at the time of the death of the intestate are dead, then the representative of such next of kin, being entitled to the beneficial interest, is also entitled to administration *de bonis non*, must, it appears, be understood with this limitation, viz., that a

(e) *Cardale v. Harvey*, 1 Cas. temp. Lee, 179.

(f) But the Court is not obliged to grant to the largest interest: 1 Cas. temp. Lee, 177.

(g) 2 Hagg. Appendix, 150.

(h) *Ibid.* 155.

(i) S. C., 2 Hagg. Appendix, 152, note (a).

(k) See also *In the goods of Middleton*, 2 Hagg. 60; *In the goods of Gill*, 1 Hagg. 341.

person originally in distribution is preferred to the representative of the next of kin (*l*). According to the general practice a party having a direct interest is preferred to those entitled in a representative character, but the matter is in the discretion of the Court, which will have regard to special circumstances (*m*).

It has already been observed, that upon the death of a creditor administrator, a party who was next of kin at the time of the death of the intestate may come in and claim administration *de bonis non* (*n*). And though all the next of kin at the time of the death are dead, it should seem that no grant of administration *de bonis non*, however limited in its object, can be obtained after the termination of the creditor administration, without citing those who are next of kin at the time the grant is required. Thus, in *Skeffington v. White* (*o*), the intestate died in 1790, leaving two sisters entitled to distribution: They renounced, and administration was decreed in 1791, to a creditor, who administered the estate in 1806, when he died: the sisters did not come in and take administration *de bonis non*; and from that time no further representation was taken out till 1827, when an administration *de bonis non* was granted, *without citing the then next of kin* (the son of one of the sisters, who were both dead), limited to assign a certain leasehold property of the deceased, not severed in his lifetime, but mortgaged during the original creditor administration: In March, 1828, Sir Lumley Skeffington, the then next of kin in whom all the beneficial interest in the deceased's estate was vested, obtained a decree to show cause why the latter administration should not be revoked, on the ground of his not having been cited when the limited grant was made, and on a suggestion that such grant had been surreptitiously obtained, and that there was a surplus belonging to the deceased's estate: Sir John Nicholl thought the citation under the circumstances was not necessary, but that Sir Lumley was barred by time, by events, and by his own laches; and that there was no ground for revoking the grant: However, on appeal to the Delegates, the Court pronounced for the appellant, directed a monition to issue to call in the limited administration, and condemned the respondent in costs (*p*).

Citation of next of kin before grant of administration *de bonis non*.

(*l*) *In the goods of Middleton*, 2 Hagg. 61.

(*m*) *In the goods of Carr*, 1 P. & D. 291. Cf. *In the goods of Johnson*, 7 L. R. Ir. Ch. D. 1; *In the goods of Kinchella*, [1894] P. 264. And see *ante*, pp. 348, 349.

(*n*) *Ante*, p. 356.

(*o*) 1 Hagg. 699.

(*p*) 2 Hagg. 626.

SECTION III.

Of Limited Administrations.

Besides the Administrations already discussed, which extend to the whole personal estate of the deceased, and terminate only with the life of the grantee, it is competent to the Court to grant *limited* administrations, which are confined to a particular extent of time, or to a specified subject-matter. It will be the object of the present and three following sections, to consider this species of grant.

Rule 29, P.R.
1862.

Consent or
citation of
persons en-
titled to
general grant.

Rule 30. A
person en-
titled to
general grant
not to take a
limited one.

By Rule 29, P. R., "Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge."

By Rule 30, "No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant except under the direction of the Judge" (q).

Administration durante minore ætate.

If the person appointed sole executor, or he to whom, in case of intestacy, the right to administration has devolved under the statutes, be within age, a peculiar sort of administration must be granted, which is called an administration *durante minore ætate*. In the former case, it is obviously a species of administration *cum testamento annexo*.

When neces-
sary:

If there are several executors, and one of them is of full age, no administration of this kind ought to be granted; because he who is of full age may execute the Will (r). But it has been held differently in the case of several next of kin in equal degree, entitled under an intestacy. In *Cartright's Case* (s), the intestate died leaving four grandchildren whereof one was of age, and the other three were minors; and the administration

(q) The registrar obtains this direction. The Court has departed from the practice stated in Rule 30 in *In the estate of Von Brentano*, [1911] P. 172, following *Patteson v. Hunter* (1860), 30 L. J. P. & M. 272. As to cases in which there is real estate, and coming within the operation of the Land Transfer Act, 1897, see Probate Rule 109 (Nov. 20, 1897), *ante*, p. 245.

(r) *Pigot and Gascoigne's Case*, Brownl. 46; *ante*, p. 154. There are, however, some authorities to the contrary. See *Colborne v. Wright*, 2 Lev. 240; Bac. Abr. Executors (B. 1).

(s) 1 Freem. 258. See *Sawbridge v. Hill*, L. R. 2 P. & D. 219; and see *ante*, p. 337.

was contested betwixt her that was of age and the mother and guardian of the other three; and this case was argued at Serjeants' Inn, before the two Chief Justices and the Chief Baron, *et al.*, who granted it to the mother, as guardian to the three, *durante minore ætate*; though it was strongly urged, that she that was of age being capable, and the others incapable, she ought to be preferred: But, on the other hand, it was laid down, that since the Statute of Distribution (22 & 23 Car. II. c. 10), which entitled them all to a distribution, the interest of the three preponderated, and therefore that was to be regarded; and they compared it to the case of a residuary legatee who shall be preferred before the next of kin (*t*).

This sort of administration has been frequently held not to be within the statute of 21 Hen. VIII. c. 5. And consequently, it is discretionary in the Court to grant it to such person as it shall think fit (*u*). Thus, in the case of *Rex v. Bettsworth* (*x*), a *mandamus* was moved for, to be directed to the Judge of the Prerogative Court, to grant administration to one Smith, during the minority of his two infant grandchildren: The Judge had approved of him as a proper person, but insisted on his giving security to distribute the effects in equal proportions among the creditors: The Court were of opinion that the Judge had a discretionary power in granting administration *durante minore ætate*, and therefore that in this case he might insist upon reasonable or equitable terms, or otherwise refuse administration to the claimant: But they said if a *mandamus* had been moved for, to grant administration generally, they would have granted it (*y*).

no *mandamus*
lay to grant
it to a par-
ticular person.

In the exercise of this discretion it was the practice of the Spiritual Court to grant the administration to the guardian whom that Court had a right by law to appoint for personal estate (*z*). With respect to the appointment of guardian a

Practice of
the Spiritual
Court to grant
administra-
tion to the
guardian:

(*t*) See *ante*, p. 377.

(*u*) *West v. Willby*, 3 Phillim. 379.

(*x*) 1 Barnard. 370, 425.

(*y*) The discretionary power of the Spiritual Court is also recognized in the Administration of Estates Act, 1798 (38 Geo. 3. c. 87), s. 6. See *post*, p. 398.

(*z*) *Lowry v. Reynes*, 2 Lev. 217; *In the goods of Weir*, 2 Sw. & Tr. 451. See also *Brotherton v. Harris*, 2 Cas. temp. Lee, 131. In this case it was held that the guardian appointed by the Ecclesiastical Court was to be preferred to the guardian appointed by the Court of Chancery. But see *Buck v. Draper*, 3 Atk. 631, and note (70) to Co. Lit. 88, *b*, by Hargrave, in which the right of the Ecclesiastical Court to appoint a guardian for the personal estate is doubted. It

distinction
between
infant and
minor :

distinction exists between an infant and a minor. The former is so denominated, if under seven years of age, the latter from seven to twenty-one (*a*). The Court *ex officio* assigns, where necessary, a guardian to an infant (*b*); the minor himself may nominate his guardian, who is then admitted in that character by the Judge (*c*); but if the minor makes an improper choice, the Court will control it (*d*). According to the practice of the Prerogative Court, the guardianship was granted to the next of kin of the child, unless sufficient objection to him was shown (*e*). The father of the infant had therefore the best right to be appointed, and was as a general rule preferred by the Court, and in the absence of reason to the contrary, the grant of administration for the use of the infant or minor was made to him (*f*). If the father was not living the guardian, if any,

would seem, however, that it was merely where there was personal property only, and no real estate, that the Spiritual Court had power to appoint a guardian; at least, this was so contended by the Courts of Common Law. See *Bishop of Carlisle v. Wills* (1672), 2 Lev. 162; *Morgan v. Ditton* (1724), 9 Mod. 140. In the case of *In the goods of Sartoris*, 1 Curt. 910, administration, for the use and benefit of minor children of a Frenchman deceased, was granted to their guardian appointed by the French authorities. And see *In the goods of Johnston*, 4 Hagg. 182; *In the goods of Jones*, 28 L. J. P. & M. 80. It has been held that a testamentary guardian of minor children is entitled to a grant of the administration for their use and benefit preferably to a guardian elected by the children: *In the goods of Morris*, 2 Sw. & Tr. 360. The guardian of an infant, sole next of kin of an intestate, whose estate is solvent, is entitled to take administration of his effects, in preference to creditors: *John v. Bradbury* (1886), L. R. 1 P. & D. 245. As to giving justifying security in such a case, see *ibid.* The general rule, however, is that the creditors as such have no right to call upon the next of kin to give justifying security: *Hughes v. Cookson*, 1 Cas. temp. Lee, 386; *Hickman v. Black*, 2 Cas. temp. Lee, 251.

(*a*) Toller, 100.

(*b*) Sir G. Lee was of opinion, that he could not assign a guardian to an infant in *ventre de sa mère*: *Walker v. Carless*, 2 Cas. temp. Lee, 560.

(*c*) *Rich v. Chamberlayne*, 1 Cas. temp. Lee, 134.

(*d*) *Fawkener v. Jordan*, 2 Cas. temp. Lee, 330. This is mentioned by Lee, J., in *Rex v. Bettesworth*, Fitzg. 164, Mich. 4 Geo. II., as being then the course of the Spiritual Court.

(*e*) Toller, 100; *In the goods of Ewing*, 1 Hagg. 381. But the Court may, in its discretion, pass by the next of kin: *In the goods of Ewing*, 1 Hagg. 381, *post*, p. 395, note (*l*); *Quick v. Quick*, 33 L. J. P. & M. 177; *In the goods of Gardiner* (1884), 9 P. D. 66; *In the goods of Webb* (1888), 13 P. D. 71. On one occasion a creditor was appointed guardian to minors (the only children of E. P.), who had no known relations, for the purpose of taking out administration to the estate of E. P., who had died intestate and insolvent: *In the goods of Peck*, 1 Sw. & Tr. 141.

(*f*) The father may be passed over for good cause shown: *Lovell v. Cox*, cit. 3 Phillim. 379; *In the goods of Hay*, L. R. 1 P. & D. 51; *In the goods of Stephenson*, *ibid.* 287.

appointed by the father's deed or Will under 12 Car. II. c. 24, was preferred (*g*).

If a wife be the only next of kin, and a minor, she may elect her husband her guardian, to take the administration for her use and benefit, during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her (*h*).

But there are many instances where the Court has granted the administration to persons not guardians of the minor, and refused to grant it to the person nominated by them. Thus in *Lovell and Brady v. Cox* (*i*) Lovell and Brady were appointed trustees by the deceased, and his heir, Annie Cox, was executrix and residuary legatee: She was a minor, and the father claimed the administration *pendente minoritate*: The Court held that it had a discretionary power, refused it to him, and gave it to the trustees (*j*). So the administration may be granted to creditors, in exclusion of the guardian of the minor, if the estate is insufficient to pay the debts: And in many other cases it has been laid down that the Court is not bound by the choice of the minor (*k*). Thus, where a grandfather, to whom, as the next of kin, the administration *durante minoritate* would in the ordinary course have passed, was over eighty, it was granted to an uncle, he giving full justifying security (*l*).

the guardian
sometimes
excluded.

In *Havers v. Havers* (*m*), Lord Hardwicke, C., said, that administration *durante minore etate* ought not to have been granted to a person who was very poor, though the guardian and next of kin of the infant.

The old practice above stated has been applied, and in some respects varied, by the rules, P. R. Non-contentious, as follows:—

By Rule 33, "Grants of administration may be made to guardians of minors and infants for their use and benefit, and

Rules P.R.
1862 (Non-
contentious)
as to grants
to guardians.
Rule 33.

(*g*) *In the goods of Morris*, 2 Sw. & Tr. 360; and see *In the goods of Parnell*, L. R. 2 P. & D. 379.

(*h*) Toller, 92.

(*i*) Prerog. cited by Sir John Nicholl in *West v. Willby*, 3 Phillim. 379.

(*j*) See also *Appleby v. Appleby*, 1 Cas. temp. Lee, 135, where administration *cum testamento annexo* was granted to a grandmother during the minority of an executor, she being also testamentary trustee, in preference to the mother, whom the minor had chosen guardian. See also *Hughes v. Ricards*, 2 Cas. temp. Lee, 543.

(*k*) *West v. Willby*, 3 Phillim. 374.

(*l*) *In the goods of Ewing*, 1 Hagg. 381.

(*m*) Barnard. Chanc. Cas. 23.

elections by minors of their next of kin or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with."

Rule 34. 34. "In cases of infants (*i.e.*, under the age of seven years) not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the Judge, or of one of the Registrars; the Registrar's order is to be founded on an affidavit, showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship."

Rule 35. 35. "Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them by order of the Judge or a Registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the Judge or of a Registrar."

Rule 36. 36. "In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants."

Effect of the
Guardianship
of Infants
Act, 1886.

The Guardianship of Infants Act, 1886, which has given the mother rights of guardianship, and has therefore occasioned an alteration in the practice, should here be mentioned (*n*). By sect. 2 of this Act, on the death of the father of an infant, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any other guardian appointed by the father. When the guardian has been appointed by the father, or if such guardian is dead or refuses to act, the Court may appoint a guardian or guardians to act jointly with the mother (*o*).

(*n*) 49 & 50 Vict. c. 27.

(*o*) The re-marriage of the mother is not of itself a ground for the appointment of a joint-guardian under this section: *In re X.*, [1899] 1 Ch. 526.

And by sect. 3 (1) the mother of any infant may by deed or Will appoint a guardian or guardians after the death of herself and the father; and where guardians are appointed by both parents they shall act jointly: And by sect. 4, every guardian under the Act is to have all the powers of a guardian appointed under the Act of 12 Car. II. c. 24. It would seem that no election or assignment of the mother of the minor or infant as guardian to take or renounce a grant is necessary, but she is required to file a declaration (*p*).

In a case in the Prerogative Court, the residuary legatee was a minor, married to a husband who was also a minor, both being subjects of, and resident in, Portugal: But it appeared that the husband, by reason of his holding a commission in the army, and being married, by the law of Portugal was considered of full age, and that by her marriage, the wife's disabilities, as a minor, ceased: Under these circumstances, administration with the Will annexed, limited to the receipt of certain dividends in the English funds, was granted to the wife (*q*).

Administra-
tion granted
to a minor, a
foreigner,
entitled by
the law of his
own country.

Where an intestate left a widow and infant son, and administration was granted to the widow, who soon after became *non compos*, and the estate was small and unable to bear the expense of a commission of lunacy, and there were debts owing to it, which were in danger of being lost, if there was no person to receive them; Sir George Lee, without revoking the administration granted to the widow, assigned (upon the renunciation and consent of the grandmother) the infant's aunt to be his guardian, and granted administration to her also, for the use and benefit of the widow and infant, during the incapacity of the widow, and the minority of the infant, if the widow should not sooner recover her senses: And the learned Judge directed the administration to be drawn up in a special form, reciting the above particulars (*r*).

Administra-
tion during
the incapacity
of a widow,
and minority
of her son.

It has already been pointed out (*s*) that formerly an infant

Administra-
tion *durante*

(*p*) See Tristram & Coote's Probate Practice, 15th edit. 146; and Mortimer's Probate Law and Practice, 370.

(*q*) *In the goods of the Countess Da Cunha*, 1 Hagg. 237. But see *contra*, *In the goods of Orleans*, 1 Sw. & Tr. 253, in which Sir C. Oresswell held that the Court will not follow the grant of the country of domicile when it would by so doing be acting in contradiction to the law of this country. See also *In the goods of Meatyard*, [1903] P. 125.

(*r*) *Anon.*, 1 Cas. temp. Lee, 625.

(*s*) *Ante*, p. 154, note (*q*).

minore ætate
of an infant
executor.
Stat. 38 Geo.
III. c. 87,
s. 6.

executor was considered capable of the office, on attaining the age of seventeen: But now by the Administration of Estates Act, 1798 (38 Geo. III. c. 87), s. 6 (*t*), after reciting that inconveniences arose from granting probate to infants under the age of twenty-one, it is enacted, "That where an infant is "sole executor, administration with the Will annexed shall be "granted to the guardian of such infant; or to such other person "as the Spiritual Court shall think fit, until such infant shall "have attained the full age of twenty-one years, at which "period, and not before, probate of the Will shall be granted "to him."

S. 7.
When ad-
ministration
durante minore
ætate deter-
mines:

And by the seventh section it is enacted that, "The person "to whom such administration shall be granted shall have the "same powers vested in him as an administrator now hath by "virtue of an administration granted to him *durante minore* "*ætate* of the next of kin."

Formerly
distinction
between ad-
ministration
during
minority of
infant execu-
tor and infant
next of kin.

Before this Act there was a distinction between administra- tion granted during the minority of an infant executor and an infant next of kin: inasmuch as in the latter case the adminis- tration has always been held to continue in force till the next of kin attained the age of twenty-one (*u*).

Administra-
tion granted
during
minority of
several
infants.

It seems agreed, that if administration be granted during the minority of several infants, it determines upon the coming of age of any one of them. Thus if there be several infant executors, he who first attains the age of twenty-one shall prove the Will, and may execute it (*v*).

It was resolved, according to Lord Coke, by the justices of the Common Pleas in *Prince's Case* (*w*), that if administration be committed during the minority of an executrix, and she take husband of full age, then the administration shall cease. But this has since been doubted, in the case of *Jones v. Lord Strafford* (*x*), where Lord King, C., and Raymond, C. J., strongly inclined against this opinion as reported in *Prince's Case*, the same not being taken notice of by other contemporary Reporters, as 2 And. 132; Cro. Eliz. 718, 719; and 3 Leon. 278, in all which books *Prince's Case* is reported: Besides which it was

(*t*) Extended to Ireland by 58 Geo. III. c. 81, ss. 1, 2.

(*u*) *Freke v. Thomas*, 1 Lord Raym. 667; 4 Burn, E. L. 384, Phillimore's edition; and see the remarks of Phillimore, L. J., in *Hewson v. Shelley*, [1914] 2 Ch. at p. 43.

(*v*) 4 Burn, E. L. 385, Phillimore's edition.

(*w*) 5 Co. 29, b.

(*x*) 3 P. Wms. 88.

extrajudicially expressed, the question in the case being only whether such a special administrator could assign over a term for years which belonged to the testator: and it is remarkable that the author of the *Office of Executor*, after mentioning the proposition as stated in *Prince's Case*, proceeds, "Yet I do a little marvel at these opinions, considering that these things are managed in the Spiritual Court, and by that law (the law spiritual) which intermeddles not with the husband in the wife's case; now by that law, and not our common law, comes in this limit of seventeen years. And I have seen it otherwise reported, in and touching the last point" (y).

If administration be granted during the minority of several infants, one of whom dies before he comes of age, this will not determine the administration (z). If an administrator *durante minore ætate* recovered judgment, and then his time determined, the executor formerly might have had a *scire facias* upon that judgment (a).

Formerly, questions seem to have been raised about the power of an administrator *durante minore ætate*, but it seems now settled that the limit to his administration is the minority of the person, there is no other limit, and while the minority lasts he has all the powers of an ordinary general administrator. This was the opinion of Jessel, M. R., who in the course of his judgment in *Re Cope* (b) said: "The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way, and the property vests in him." A power of sale given by a testator to his executors or administrators may be executed by an administrator *durante minore ætate* (c). So he may assent to a legacy, if there are assets for the payment of debts (d). So he may be sued for the debts due from the deceased: and if he give his bond for any of such debts, he may retain goods to the value (e): and

Administra-
tion *durante*
minore ætate,
limit of:

what acts
such admin-
istrator may
do.

(y) Wentw. 392, 14th edit.

(z) *Anon.*, Brownl. 47; *Jones v. Strafford*, 3 P. Wms. 89; overruling the opinion in *Brudnel's Case*, 5 Co. 9, a.

(a) As to the proceedings substituted for *scire facias* by the Judicature Act, 1875, see *post*, Pt. v. Bk. II. Ch. I.

(b) 16 C. D. 49, 52.

(c) *Monsell v. Armstrong*, L. R. 14 Eq. 423.

(d) Bac. Abr. Exors. (B. 1), 2; *Prince's Case*, 5 Co. 29, a; *Anon.*, 1 Freem. 288.

(e) *Briers v. Goddard*, Hob. 250; Com. Dig. Admon. (F.).

if an action be brought against him, and the administration determine pending the action, he ought to retain assets to satisfy the debt which attached on him by the action (*f*). Likewise he may retain for his own debt (*g*).

It has been said that he cannot do anything to the prejudice of the infant; and therefore cannot sell the goods of the deceased any farther than so far as necessary for payment of debts, or otherwise sell a term of years during the minority of the infant (*h*). It seems now settled, however, that the administrator *durante minore ætate* can sell a term of years or any other assets for any purpose of due administration, as for the purpose of winding up a public-house or business (*i*). Whether in the event of his selling otherwise than in due course of administration a purchaser from him in good faith would acquire a good title, or whether a purchaser is bound to satisfy himself that the sale is for due purposes of administration, appears never to have been expressly decided, and the Lords Justices in the case of *Thompson and McWilliam's Contract* (*k*) appear to have expressly refrained from over-ruling or expressing an opinion as to the case of *Re Robinson* (*l*) (the point decided in that case not arising in the appeal before them), where the Irish Vice-Chancellor held that there being no debts, and so far as appears from the report, no need to sell for due purposes of administration, the administrator had no power to sell and could not give a title. The decision of the Vice-Chancellor was, however, before the case of *Re Cope* (*m*), decided by Jessel, M. R., already referred to, and was arrived at with considerable doubt and in deference to old dicta in the text books, and it is submitted that that case or those dicta would not now be followed, and that an administrator *durante minore ætate* is during the minority in all respects on the same footing as an ordinary general administrator.

(*f*) *Sparkes v. Crofts*, Comberb. 465, by Lord Holt.

(*g*) *Roskelly v. Godolphin*, T. Raym. 483; Com. Dig. Admon. (F.).

(*h*) Bac. Abr. tit. Exor. (B. 1), 2.

(*i*) As to the distinction between a special administration granted *ad opus et commodum et utilitatem* of an infant executor during his minority and *non aliter nec alio modo* and such administration granted generally, see *Prince's Case*, 5 Co. 29; *Sir Moyle Finch's Case*, 6 Co. 67, *b*; *Price v. Simpson*, Cro. Eliz. 718; Bac. Abr. tit. Leases, *i*. 7; Touchstone, 490.

(*k*) [1896] 1 Ir. R. 356.

(*l*) 3 L. R. Ir. 429.

(*m*) 16 C. D. 49. And see *Monsell v. Armstrong*, L. R. 14 Eq. 423; *Hewson v. Shelley*, [1914] 2 Ch. 13.

In the case of an action brought by an administrator *durante minore ætate*, he must have averred in the declaration that the infant was still under age (*i.e.*, in all cases since the stat. 38 Geo. III. c. 87, s. 6, that he was within the age of twenty-one years (*n*)); because it is a matter within his conuzance, and which entitles him to the action (*o*). However, the defendant must have taken advantage of this omission by way of plea or demurrer, and could not object to it after he had joined issue with the plaintiff on another point, which admits the continuance of his authority (*p*).

In an action by an administrator *durante*, &c., it must have been averred that the infant is within age.

But if an action were brought *against* such an administrator, the plaintiff in his declaration was not obliged to aver that the infant was still under age; for this is a matter more properly within the conuzance of the defendant, and, if his power be determined, he ought to show it (*q*).

Secus, in an action *against* him.

It was a good plea in abatement, where a defendant was charged as administrator generally, that administration was granted to him *durante minore ætate* only: But it was necessary that such a plea should aver that the infant was still living and under age; for though the defendant was a special administrator at first, yet if that special administration were determined, as by the death of the infant, he might be administrator generally, as the declaration supposes (*r*).

Plea, by such administrator, if charged as administrator generally.

It is submitted that, although the forms of pleading have been altered by the Judicature Acts, the averments above alluded to would still be properly introduced in like cases.

It has been laid down, that if an executor *durante minore ætate* has duly administered the assets, and paid over the surplus to the executor of full age, he is not chargeable to creditors, and he may show this matter under a general plea of *plene administravit* (*s*): but that if he has committed a devastavit, he will be liable to creditors (*t*); even though he should obtain a release from the infant, when of full age (*u*).

Liability of such an administrator after administration determined:

to creditors:

(*n*) Previous to this statute the administration determined on an infant executor attaining the age of seventeen, which explains what was said by Treby, C. J., in the case of *Beal v. Simpson*, 1 Ld. Raym. 408.

(*o*) *Piggot's Case*, 5 Co. 29, *a*.

(*p*) Bac. Abr. Exors. (B. 1), 2.

(*q*) *Beal v. Simpson*, 1 Ld. Raym. 409, by Powell, J.

(*r*) *Sparkes v. Croft*, 1 Ld. Raym. 265; Bac. Abr. Exors. (B. 1), 3.

(*s*) *Anon.*, 1 Freem. 150. See also *Brooking v. Jennings*, 1 Mod. 174.

(*t*) Bull. N. P. 145, citing *Palmer v. Litherland*, Latch. 160; *Packman's Case*, 6 Co. 19, *b*.

(*u*) *Anon.*, 1 Freem. 150; Com. Dig. Admon. (F.).

However, it is stated by Lord C. B. Gilbert (x), that such an administrator is not chargeable at the suit of a creditor after the infant comes of age: but such creditor may sue the infant, who has his remedy against the executor (y). And it is said by Lord Hardwicke, in *Fotherby v. Pate* (z), that though an administrator *durante minore ætate* represents the deceased while his administration subsists, yet when it is determined, he has nothing more to do, nor can he be called to account but by the executor: and that whatever he may do during his administration, he is not liable to any other person.

His Lordship proceeded to observe, that after such an administrator has possessed himself of effects, if he is brought before the Court, without the executor, he may demur for that cause: but as the Court would allow a party to follow assets into any hands, if it were shown by proper charges that he had not accounted to the infant, but fraudulently and by collusion detained any part, there was no doubt but that such a bill might be maintained against an administrator *durante minore ætate* (a).

It seems clear that an administrator *durante minore ætate*, who has wasted the goods of the deceased, cannot be charged by a creditor as executor *de son tort*, after the infant has attained his majority; because the administrator at the time had lawful power to administer (b).

to a subsequent administrator:

In *Taylor v. Newton* (c), an administration had been granted to a guardian *pendente minoritate* of a widow, and on her coming of age she renounced for herself and her only child, an infant, and administration was granted to a creditor, to whom the guardian refused to account: whereupon he was called on by the creditor to give in an inventory and account: The guardian appeared under a protestation, because his administration was expired, and his counsel insisted that he was not liable to account, now his administration was expired: But Sir George Lee decreed him to give in an inventory and account by a day specified, and condemned him in costs.

(x) Bac. Abr. Exors. (B. 1), 2.

(y) See also accord. *Brooking v. Jennings*, 1 Mod. 175, by Vaughan, C. J.

(z) 3 Atk. 603.

(a) 3 Atk. 605.

(b) *Palmer v. Litherland*, Latch. 160, by Doddridge and Jones, JJ.; *Lawson v. Crofts*, 1 Sid. 57.

(c) 1 Cas. temp. Lee, 15.

With respect to the liability of such an administrator to the infant, after he has come of age, it was laid down that if the administrator wasted the assets, the proper way for the infant to charge him was by action on the case (*d*). Also by some opinions the infant might bring detinue against him for those goods which he still continued in his possession, or he might oblige him to account in the Spiritual Court (*e*), but could not bring a writ of account against him at law (*f*).

It has been said that if an administration *durante minore ætate* be repealed, and another made administrator *durante minore ætate*, and the second administrator brings the first administrator to account, and after releases to him, yet the infant at full age may compel the first administrator to account again to him, and the first account to the second administrator, and his release shall not be any bar to it (*g*).

It was held that if a man obtained judgment against an administrator *durante minore ætate*, and afterwards the executor or administrator came of age, a *scire facias* (*h*) lay against him, upon the judgment (*i*).

Although an administrator of an executor is not administrator to the first testator, yet the administrator *durante minore ætate* of the executor of an executor is in *loco executoris*, and the representative of the first testator (*k*). Therefore, in an

to the infant
when of age.

Liability of
administrator
to account
to infant,
although his
administra-
tion repealed,
and a second
administrator
has been
appointed
and has re-
leased him.

Liability of
infant on
judgment
against ad-
ministrator.

Administrator
*durante minore
ætate* of exe-
cutor of an
executor.

(*d*) Bac. Abr. Executors (B. 1), 2; *Lawson v. Crofts*, 1 Sid. 57.

(*e*) 1 Anders. 34; Com. Dig. Administration (F.); Bac. Abr. Exors. (B. 1), 2.

(*f*) 1 Anders. 34; Bac. Abr. Exors. (B. 1), 2.

(*g*) Roll. Abr. Exors. (M.), pl. 3. Cf. *Hill v. Curtis*, L. R. 1 Eq. 90, where it was held that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account; but Sir William Page Wood, V.-C., at p. 98, says: "It is plain that an executor cannot discharge himself by accounting to his co-executor, because he is himself authorized, and it is his duty to see how the assets are applied. When he has paid over the assets he is not discharged: he must see to their application. If he is so foolish as to part with possession of the assets to his co-executor, though he is not answerable for his co-executor's receipts, he is responsible for what he so pays over." The same view was taken by Sir Barnes Peacock in *De Cordova v. De Cordova*, 4 App. Cas. 692, 703. However, in *Re Houghton*, [1904] 1 Ch. 622, it was held by Kekewich, J., that it is competent for an executor in a proper case to compromise a claim by his co-executor against the estate; but *Hill v. Curtis* is not referred to in the report. See, further, Trustee Act, 1893, s. 21, *post*, p. 1419.

(*h*) As to the proceedings now substituted in lieu of *scire facias* by the Judicature Act, 1875, see *post*, p. 1584.

(*i*) *Sparkes v. Crofts*, 1 Ld. Raym. 265.

(*k*) *Anon.*, 1 Freem. 288.

action by a creditor of the original testator, such an administrator is properly charged as the administrator *durante minore etate* of the second executor, and not as the administrator *de bonis non* of the original deceased (*l*). And he might formerly be sued in the Spiritual Court for a legacy bequeathed by the latter (*m*).

SECTION IV.

Of Administration pendente lite.

In case of a controversy in the Spiritual Court concerning the right of administration to an intestate, it seems to have been always admitted, that it was competent to the Ordinary to appoint an administrator *pendente lite*: Yet where the controversy before the Ordinary respected a Will, it was once considered that a grant of this species of administration was utterly void (*n*). But since the case of *Walker v. Woollaston*, decided in K. B., on error from C. P., Trin. T. 1731 (*o*), it has been settled, that the Court has the power to grant administration *pendente lite* as well touching an executorship as the right to administration (*p*).

20 & 21 Vict.
c. 77, s. 70.
Court may
grant admin-
istration *pen-
dente lite*.

And now by the 70th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is enacted, that "pending any suit touching the validity of the Will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction" (*q*).

(*l*) *Norton v. Molyneux*, Hob. 246.

(*m*) *Anon.*, 1 Freem. 288.

(*n*) *Robin's Case*, Moore, 636; *Smyth v. Smyth*, 3 Keb. 54; *Frederick v. Hook*, Carth. 153.

(*o*) 2 P. Wms. 589.

(*p*) *S. P.*, *Wills v. Rich*, 2 Atk. 286; *Maskeline v. Harrison*, 2 Cas. temp. Lee, 258; and see the remarks of Phillimore, L. J., in *Hewson v. Shelley*, [1914] 2 Ch. at p. 43.

(*q*) See *Charlton v. Hindmarsh*, 1 Sw. & Tr. 519, where the Court directed that the administrator should not discharge claims on the deceased's estate until they had passed before the Registrar. The Court has power, under this section, to appoint an administrator *pendente lite* in contested testamentary and administration suits, on

By the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 22, "all the provisions contained in the Court of Probate Act, respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act."

21 & 22 Vict.
c. 95, s. 22,
to apply to
appeals.

Further, by the Court of Probate Act, 1857, s. 71, it is enacted, that "it shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid, or any other person, to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any Will of such deceased person, by which his real estate may be affected; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct" (r).

20 & 21 Vict.
c. 77, s. 71.
Receiver of
real estate
pendente lite.

the application of a person who is not a party to the suit. In an administration suit which was likely to be protracted, the Court appointed an administrator *pendente lite*, at the instance of a creditor who was not a party to the suit: *Tichborne v. Tichborne*, L. R. 1 P. & D. 730; *In the goods of Evans*, 15 P. D. 215; *In the estate of Cleaver*, [1905] P. 319. A suit having been instituted to try the validity of the Will of the deceased, and judgment having been given to establish it, one of the parties appealed from such judgment to the House of Lords. A difficulty having arisen in the Court of Chancery as to the owners of the executors to give a good title to certain leasehold property belonging to the deceased's estate, under the probate and pending the appeal, the Court ordered the probate to be brought into the Registry, and thereupon the letters of administration *pendente lite* should be granted to the executors: *Wright v. Rogers*, L. R. 2 P. & D. 179. A married woman under a power executed a Will, and her husband by his Will made her universal legatee and sole executrix. She survived him but did not take probate of his Will nor re-execute her own. Litigation having arisen on the question whether the wife's executors were entitled to a limited or general grant of probate, the Court appointed an administrator *pendente lite* to the estate of the husband, as well as one to the estate of the deceased: *In the goods of Dawes*, L. R. 2 P. & D. 147. This case was followed by Butt, J., in the case of *In the goods of Fawcett*, 14 P. D. 152, where that learned judge is reported to have said that he was "not altogether satisfied that in that case the attention of the Court had been sufficiently called to the words of the 70th section." The Will in dispute was the Will of the widow, and there was no *lis pendens* touching the husband's Will, and the words of the 70th section are, "pending any suit touching the validity of the Will of any deceased person." *In the goods of Fawcett* was followed by Evans, P., in *Shorter v. Shorter*, [1911] P. 184.

(r) See *Grant v. Grant*, L. R. 1 P. & D. 654, where it was held that the Court has no jurisdiction to appoint a receiver of the real estate of the deceased when there is no suit pending touching the validity of the Will, e.g., when the only litigation is by petition in reference to the individual appointed executor. Notice to the heir-at-law is usually required: *Wiggins v. Hudson*, 80 L. T. 296; but may

21 & 22 Vict.
c. 95, s. 21.

The Court of
Probate may
require security
from the
receiver of
real estate.

By the Court of Probate Act, 1858, s. 21, "It shall be lawful for the Court of Probate to require security by bond in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said Court, under section seventy-one of 'The Court of Probate Act,' and the Court may, on application made on motion or in a summary way, order one of the registrars of the Court to assign the same to some person to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security, or put the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof" (s).

Of what the
Court must
be satisfied
before grant-
ing adminis-
tration *pen-
dente lite*.

Administra-
tion *pendente
lite* granted
though re-
ceiver ap-
pointed by
Court of
Chancery.

Before granting administration *pendente lite* the Court must be satisfied as to the necessity of such an administrator (*t*), and also as to the fitness of the proposed administrator: or must be placed in a condition to determine between the two (its most usual office upon such occasions), where an administrator is being proposed by each party (*u*). The Court will appoint an administrator *pendente lite* if it is just and proper to do so, although a receiver may have been appointed by the Court of Chancery in a suit pending between the same parties and affecting the same property as the testamentary or administration suit (*v*). The Court has no jurisdiction to appoint a receiver or administrator *pendente lite* until after a writ in an action

be dispensed with in special circumstances: *Mathew v. Tooze*, 24 T. L. R. 465.

(s) See the provisions of the Grant of Administration (Bonds) Act, 1919 (9 & 10 Geo. V. c. 26).

(*t*) *Young v. Brown*, 1 Hagg. 54; *Bellew v. Bellew*, 34 L. J. P. M. & A. 125. But where the estate of the deceased consists of his share of a business which he was carrying on in partnership at the time of his death, and which is continued by the surviving partner, the Court will not appoint an administrator *pendente lite* against the wish of the surviving partner, unless a strong case is made out that he dealt improperly with the business: *Horrell v. Witts*, L. R. 1 P. & D. 103. Neither will the Court appoint an administrator *pendente lite* where there is a person named in the Will as executor, whose appointment is not questioned, and who can discharge the duties of such an administrator: *Mortimer v. Paull*, L. R. 2 P. & D. 85.

(*u*) *Northey v. Cock*, 1 Add. 329.

(*v*) *Tichborne v. Tichborne*, L. R. 1 P. & D. 730.

has been issued. A caveat, warning, and appearance do not constitute a *lis pendens* (*w*).

The later practice of the Prerogative Court was to appoint an administrator *pendente lite* in all cases where the Court of Chancery would appoint a receiver (*x*).

On the other hand, it is the practice of the Court to decline putting a litigant party in possession of the property, by granting administration pending suit to him; always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties (*y*).

Administrators *pendente lite* are the appointees of the Court, and are not to be merely considered as the nominees or agents of the several parties on whose recommendation they are selected (*z*). Therefore, in an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the Court refused to dispense with such administrators entering into a joint bond (*a*).

By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 72, "the Court of Probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court think fit."

Although doubts were entertained on the subject before the case of *Walker v. Woollaston* (*b*), it was settled that the administrator *pendente lite* might maintain actions for recovering debts due to the deceased (*c*). So where a person, whether heir-at-law or next of kin, or any other man whatsoever, kept possession of the testator's leasehold estate, such an administrator was held entitled to bring ejectments for the recovery of the

The administrator must be an indifferent person :

is not to be considered as a mere nominee of the parties.

Remuneration to administrators *pendente lite* and receivers.

Power of administrator *pendente lite* :

(*w*) *Salter v. Salter*, [1896] P. 291.

(*x*) *Bellew v. Bellew*, 34 L. J. P. & M. 125.

(*y*) *Northey v. Cock*, 1 Add. 330; *Young v. Brown*, 1 Hagg. 54; *Stratton v. Ford*, 2 Cas. temp. Lee, 49. However, administration *pendente lite* may be granted, *by consent*, to one of the litigant parties: *De Chatelain v. Pontigny*, 1 Sw. & Tr. 34. See further, as to the practice relating to the preference or rejection of nominees, *Hellier v. Hellier*, 1 Cas. temp. Lee, 281; *Bond v. Bond*, 1 Cas. temp. Lee, 333, 354. In *The Queen's Proctor v. Williams*, 2 Sw. & Tr. 353, a person who had been receiver in Chancery of the same estates was, by consent, appointed administrator *pendente lite*; and see *In the estate of Cleaver*, [1905] P. 319.

(*z*) *Stanley v. Bernes*, 1 Hagg. 221.

(*a*) *Ibid.*

(*b*) 2 P. Wms. 576.

(*c*) *Ibid.*

possession (*d*). But the nature of the authority conferred by such letters of administration was, before the passing of the Court of Probate Act, merely to collect effects (*e*); and his power did not extend either to vest or distribute them (*f*). Therefore, even to enable him to lodge money in Court, which he was not called upon to do, it was necessary for him to file a bill (*g*). And he had no authority to pay legacies; though if paid *bonâ fide* he would be allowed for them (*h*). But now, as has been already mentioned, the Court of Probate Act, 1857 (s. 70), expressly enacts that he shall have all the rights and powers of a general administrator, other than the right of distributing the residue (*i*).

Commencement and termination of duties of administrator *pendente lite*.

The duties of an administrator and receiver *pendente lite* commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of (*k*). In the absence of any appeal the functions of an administrator *pendente lite* terminate with a decree pronounced in favour of a Will and do not continue until the executors obtain probate, and the case is not altered if there are no executors (*l*).

Such an administrator is not liable to interest upon a balance in his hands, during the pendency of the action (*m*).

A receiver would formerly have been appointed by the Court of Chancery, notwithstanding an administration *pendente lite* might be also obtained;

During litigation in the Ecclesiastical Court for probate or administration, the Court of Chancery used to entertain a bill for the mere preservation of the property of the deceased, till the litigation was determined, and appoint a receiver, although the Ecclesiastical Court, by granting an administration *pendente lite*, might have provided for the collection of the effects (*n*).

(*d*) *Wills v. Rich*, 2 Atk. 286; *Jones v. Goodrich*, 10 Sim. 328.

(*e*) 1 Scho. & Lefr. 254. See also the observations of Sir H. Jenner in *Godrich v. Jones*, 2 Curt. 457.

(*f*) *Gallivan v. Evans*, 1 Ball & Beatt. 192.

(*g*) *Ibid*.

(*h*) *Adair v. Shaw*, 1 Scho. & Lefr. 254. He has no business to construe the Will; he is only to hand over the assets to the person entitled, or to dispose of them pursuant to the directions of a Court of Equity: *Ibid*. 255, 256.

(*i*) See *ante*, p. 404. He may be sued in the Chancery Division without any leave of the Court: *In re Toleman*, [1897] 1 Ch. 866; *Martin v. Toleman*, 77 L. T. 138. The Court cannot, except by consent, authorise him to pay an annuity to one of the residuary legatees: *Whittle v. Keats*, 35 L. J. P. & M. 54.

(*k*) *Taylor v. Taylor*, 6 P. D. 29.

(*l*) *Wieland v. Bird*, [1894] P. 262.

(*m*) *Gallivan v. Evans*, 1 Ball & Beatt. 191.

(*n*) Mitf. Pl. 145, 136, 4th edit.; *King v. King*, 6 Ves. 172; *Edmunds v. Bird*, 1 Ves. & Beam. 542; *Atkinson v. Henshaw*, 2 Ves. & Beam.

But although the Chancery Division of the High Court of Justice has jurisdiction so to do, it would not now entertain an application for the appointment of a receiver, but would leave the matter to be dealt with by the Probate Division. Thus in *Barr v. Barr* (o), where there was a motion for the transfer to the Probate Division of an action, which had been commenced in the Chancery Division for the appointment of a receiver of the rents and profits of a testator's real estate pending proceedings in the Probate Division to determine the validity of the Will, Sir George Jessel, M. R., made the order for transfer, and pointed out that multiplicity of proceedings was one of the evils which the Judicature Act was intended to meet, especially as shown in sect. 24, sub-s. 7, of the Act of 1873. And in *Re Ivory* (p), a motion for the appointment of a receiver and an injunction was refused in an action in the Chancery Division for the administration of the personal estate of an intestate, against the defendant to whom letters of administration had been granted, the plaintiff alleging that the defendant was illegitimate, and that he himself was next of kin, and that the letters of administration had been wrongly granted to the defendant. The Court held that the proper course of procedure was to apply in the Probate Division to have the grant recalled (q). Indeed, even before the Judicature Act, it was decided that having regard to the extended powers of the Court of Probate under sects. 70 and 71 of the Act of 1857, the Court of Chancery ought not, in cases where an administrator *pendente lite* had been appointed by the Court of Probate, to continue its former

but Chancery
Division
would not
now appoint
receiver.

85; *Ball v. Oliver*, *ibid.* 96; *Watkins v. Brent*, 1 Mylne & Cr. 102 (overruling the distinction taken by Lord Erskine in *Richards v. Chave*, 12 Ves. 462); *Wood v. Hitchings*, 2 Beav. 289; 3 Beav. 504. Such a suit need not be brought to a hearing: *Anderson v. Guichard*, 9 Haro, 275. In fact it never is brought to a hearing. But after the litigation is over in the Probate Court, the practice is to discharge the receiver and dispose of the costs. And if it appears that there was no reasonable ground for instituting the suit at all, the Court will order the plaintiff to pay all the costs, though a receiver has been appointed: *Barton v. Rock*, 22 Beav. 81; *S. C.*, *ibid.* 376. See also *Grimston v. Timms*, 18 W. R. 781.

(o) W. N. 1876, p. 44.

(p) 10 Ch. Div. 372.

(q) But see *In re Oakes*, [1917] 1 Ch. 230, where Neville, J., while expressing the opinion that it would be better, where possible, to apply to the Probate Division and not to the Chancery Court, appointed a receiver although an action was pending in the Probate Division. And see *In re Mallalieu*, 91 L. T. Jo. 398; *In re Parker*, L. J. Ch. 694; *In re Clark*, 55 Sol. Jo. 64; *Re Wenge*, [1911] W. N. 129.

practice as to the appointment of receivers pending litigation in the Court of Probate (*r*).

By Probate Rule 96 (Contentious Business) administrators and receivers *pendente lite* shall exhibit an inventory and render an account of the property of the deceased which comes to their hands.

SECTION V.

Of Administration durante absentia.

At common
law before
probate:

If the executor named in the Will, or the next of kin, be out of the kingdom, the Ecclesiastical Courts always had the power, *before probate obtained*, or letters of administration issued, of granting to another a limited administration *durante absentia* (*s*). In the case of *Clare v. Hedges*, 3 Wm. & My. (*t*), the Court held clearly that such administration was grantable by law, and that it might be a great convenience to do so; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. So in *Slater v. May*, 3 Ann. (*u*), where an action was brought by an administrator *cum testamento annexo*, *durante absentia* of the executor, Lord Holt said that it was reasonable there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minore etate* of an executor, viz., that there should be a person to manage the estate of the testator till the person appointed by him is able. The absence of the executor, or next of kin, to justify such an administration must, it seems, be an absence out of the realm (*v*).

power of
such admin-
istrator:

Such an administrator is such a legal representative as to entitle him to assign the leaseholds or other property of the deceased (*w*).

(*r*) *Veret v. Duprez*, L. R. 6 Eq. 329; *Hitchen v. Birks*, L. R. 10 Eq. 471. And see *ante*, p. 408, note (*n*).

(*s*) See 3 Bac. Abr. 56, tit. Exors. (G.); *In the goods of Suarez*, [1897] P. 82.

(*t*) 1 Lutw. 342.

(*u*) 2 Lord Raym. 1071; and see *Hewson v. Shelley*, [1914] 2 Ch. at pp. 43, 44. See *ante*, p. 350, as to administration to the attorney of the next of kin; and *ante*, p. 383, as to administration to the attorney of the executor.

(*v*) 2 Lord Raym. 1071.

(*w*) *Webb v. Kirby*, 3 Sm. & G. 333; 7 De G. M. & G. 376. See the remarks of Phillimore, L. J., on this case: *Hewson v. Shelley*, [1914] 2 Ch. at p. 43. And see *ante*, p. 400.

But *when probate was once granted*, and the executor had gone abroad, the Ecclesiastical Courts did not feel themselves authorized to grant new administration on the ground that the executor had left the kingdom. Nor could a Court of Equity interfere by appointing a receiver: because, although when once a person capable of sustaining the character of legal representative had been brought into Court, Equity could, in the case of his insolvency or misconduct, appoint another person to manage the affairs of the testator, and compel his legal representative to permit such person to sue in his name; yet, if the executor went abroad, a Court of Equity could entertain no suit, there being no person to stand in the situation of the testator (*x*). The consequence of this defect of the authority of the Spiritual Court was that there was no person existing within the jurisdiction of the Courts of Law or Equity duly authorized to appear and collect the debts. To remedy this inconvenience, the statute 38 Geo. III. c. 87 (The Administration of Estates Act, 1798), was passed, whereby, after reciting that the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons, where the executor to whom probate of the Will hath been granted is out of the jurisdiction of His Majesty's Courts of Law and Equity, it is enacted, "that at the expiration of twelve calendar months (*y*) from the death of any testator, if the executors or executor (*z*) to whom probate of the Will shall have been granted are, or is, then residing out of the jurisdiction of His Majesty's Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court, which hath granted probate of such Will, upon the application of any creditor (*a*), next of kin or legatee (*b*),

after probate
by stat. 38
Geo. III.
c. 87.

Stat. 38 Geo.
III. c. 87,
s. 1.

If, at the expiration of twelve months from a testator's decease, the executor to whom probate is granted shall not reside within the jurisdiction of His Majesty's Courts, a creditor, &c. may obtain special administration.

(*x*) *Taynton v. Hannay*, 3 Bos. & Pull. 30. In the case of the estate of a deceased person who at the time of his death was domiciled within the jurisdiction, a writ of summons can now by the order of a judge be served on an executor out of the jurisdiction. See R. S. C. Ord. XI. r. 1.

(*y*) The words "at the expiration of twelve months" have been held when compared with the words given in the form of the affidavit in sect. 2, and the grant of administration in the 3rd section, to mean at or after the expiration of that period: *In the goods of Ruddy*, L. R. 2 P. & D. 330.

(*z*) Extended to administrators by the Court of Probate Act, 1857, s. 74; *vide post*, p. 413.

(*a*) A creditor in equity, such as the assignee in bankruptcy of an absent administrator, is a creditor within the meaning of this section, and as such may obtain administration *de bonis non* of the intestate limited to the fund to which the assignee is entitled: *In the goods of Hammond*, 6 P. D. 104. And see *In the goods of Boyd*, 46 Ir. L. T. 294.

(*b*) As to the construction of these words, see *post*, p. 413, note (*f*).

grounded on the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment, *stamped only with one five shilling stamp, and shall pay no further or other duty to His Majesty, his heirs, or successors*" (c).

Sect. 2.

Form of affidavit.

Sect. 3.

Form of grant.

Statute only applied to cases where proceedings in equity.

Extended by 21 & 22 Vict. c. 95, s. 18.

Section 2 provided a form of affidavit to be made by the applicant, which contained an averment that the deponent was desirous of exhibiting a bill in equity; and section 3 contained a form of grant, limited for the purpose of proceedings in equity; and it was accordingly held that the statute applied only to cases where there were proceedings in equity; but the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 18, extended the operation of 38 Geo. III. c. 87, to all executors and administrators residing out of the jurisdiction of Her Majesty's Courts of Law and Equity, "whether it be or be not intended to institute proceedings in the Court of Chancery," and authorized an alteration in the language of the grant, so as to make it apply to grants under the Court of Probate Act, 1857.

Common administrator's oath substituted for affidavit.

Sect. 4.

The common administrator's oath is now used in place of the affidavit.

Section 4, which enabled a Court of Equity to appoint persons to collect outstanding debts, was repealed by 42 & 43 Vict. c. 59, s. 2 (The Civil Procedure Acts Repeal Act, 1879).

Sect. 5.

Stock belonging to the estate of the deceased.

Section 5 enacted, "That it shall be lawful for the accountant general of the High Court of Chancery, or for the secretary or deputy secretary of the Governor and Company of the Bank of England, to transfer, and for the Governor and Company of the Bank of England to suffer a transfer to be made of, any stock belonging to the estate of such deceased person into the name of the accountant general, in trust for such purposes as the Court shall direct, in any suit in which the person, to whom such administration hath been granted, shall be, or may have been, a party: Provided, nevertheless, that if the executors or executor, capable of acting as such, shall return to, and reside within, the jurisdiction of any of the said Courts, pending such suit, such executors or executor shall be made party to such suit, and the costs incurred, by granting such administration, and by proceeding in such suit against such administrator, shall

Executor returning to reside within jurisdiction of the Court.

(c) This provision as to the stamp was repealed by 44 Geo. III. c. 98. The ordinary estate duty, if not already paid, would, it would seem, be payable.

be paid by such person or persons or out of such fund as the Court where such suit is depending shall direct."

This statute applies to the case of an executor resident out of the jurisdiction, and out of the reach of process of His Majesty's Courts of Law and Equity, as, for instance, the case of an executor residing in Scotland (*d*). Application of statute.

It will be observed that this statute applies to executors only, and therefore administration could not be granted under it during the absence from the country of an administrator *cum testamento annexo* (*e*). But by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 74, the above statute is to apply in like manner to all cases where Letters of Administration shall have been granted and the persons to whom such administration shall have been granted shall be out of the jurisdiction of His Majesty's Courts. Extension to administrators.

The provisions of the above Acts apply to the case of an executor of an executor (*f*).

When the Probate Court in the exercise of its ordinary jurisdiction grants administration during the absence of an executor or next of kin, before probate, or administration taken out by him, such administration is at an end the moment he returns (*g*). But under the statute of 38 Geo. III. it was held that the administrator was not appointed for a limited period, but for a limited purpose, viz., to become and be made party to a bill or bills in equity, and to carry the decree or decrees into Effect of the return of the executor.

(*d*) *Hannay v. Taynton*, 2 Add. 505.

(*e*) *In the goods of Harrison*, 2 Robert. 184.

(*f*) *In the goods of Grant*, 1 P. D. 435. Under these Acts a limited grant of administration with the Will annexed was made to the personal representative of a legatee as being within the spirit, if not the letter, of the statute of Geo. III.: *In the goods of Collier*, 2 Sw. & Tr. 444. A similar grant was made to the father and guardian of infant legatees: *In the goods of Hampson*, L. R. 1 P. & D. 1; *In the goods of Lee*, [1898] 2 Ir. R. 81; and to the nominee of the assignees of the residuary legatee: *In the goods of Campion*, [1900] P. 13. And see *In the estate of Saker*, [1909] P. 233; *In the goods of Wohlgemuth*, 54 Sol. Jo. 460; *In the goods of Boyd*, 46 Ir. L. T. 294. Where the applicant is residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. III. c. 87; but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under the 18th section of 21 & 22 Vict. c. 95: *In the goods of Ruddy*, L. R. 2 P. & D. 330.

(*g*) As to an administration granted, *durante absentia*, to the attorney of an executor, see *In the goods of Cassidy*, 4 Hagg. 360; *ante*, p. 384. The power of such an administrator is wholly determined by the death of the executor: *Webb v. Kirby*, 7 De G. M. & G. 377; *ante*, p. 384; *Suwerkrop v. Day*, 8 A. & E. 624. And see *Hewson v. Shelley*, [1914] 2 Ch. at p. 43.

effect. The suit so instituted was not, therefore, to fall to the ground, and be at an end, by the return of the executor, but to go on, he being made a party in the usual course; and then the temporary administrator might account, have his costs, and be discharged (*h*).

It was held in *Clare v. Hedges* (*i*), that in the case of a common law administration *durante absentiâ*, if any of the debtors of the deceased paid his debts to the administrator *durante absentiâ*, though it was after the return of the executor or next of kin, yet, if the debtor had no notice of such return, it was a good payment.

Effect of the death of the executor.

It was held that when an administrator had been appointed under the statute (38 Geo. III. c. 87), if the executor died, the administration did not thereby come to an end, nor the authority of the administrator determine (*k*). There is no provision made in the statute for the death of the executor: but the proper course upon such an event seems to be, that in case of his dying intestate, some person should take out general administration to the original testator, or if the former executor had proved and had made a Will appointing an executor capable of acting, such executor should obtain probate, so as to represent the original testator; and then such administrator or executor, being considered within the true meaning, though not the strict letter of the statute, may apply to be made a party to any pending action, and the matter can be dealt with in the same way as if the original executor had returned to this country (*l*).

What administrator *durante absentiâ* must allege in his statement of claim.

In the case of an action brought by an administrator *durante absentiâ*, appointed independently of the statute, the statement of claim must aver that the executor at the time of the grant of administration was absent, and that his absence continues. If there is an averment of his absence, without saying

(*h*) *Rainsford v. Taynton*, 7 Ves. 466. But now, by reason of 21 & 22 Vict. c. 95, s. 18, the purpose would seem no longer so limited, and the provisions of the Judicature Acts and Rules prevent an action in any case falling to the ground. See R. S. C. 1883, Ord. XVII. r. 4. The Court of Probate Act, 1857, s. 75, however, enacts that "after any grant of administration no person shall have power to sue or prosecute any suit or otherwise act as executor of the deceased as to the personal estate comprised in or affected by such grant of administration until such administration shall have been recalled or revoked."

(*i*) 1 Lutw. 342; *S.C.*, cited from MS. in *Walker v. Woollaston*, 2 P. Wms. 579.

(*k*) *Taynton v. Hannay*, 3 Bos. & Pull. 26.

(*l*) *Rainsford v. Taynton*, 7 Ves. 460; and see the judgment of Chambre, J., in 3 Bos. & Pull. 34.

where, the Court will intend it to be an absence beyond the jurisdiction (*m*).

In an action on a policy of insurance, brought by an administrator appointed under the statute, evidence was tendered by the defendants of declarations made by the executor, whilst he was executor and before the proceedings had taken place for having the present plaintiff appointed special administrator: But Lord Denman refused to receive the evidence, saying that the acts of the original executor, done by him in that capacity, might be admissible in evidence against the plaintiff, who had succeeded *durante absentia* to the office of executor; but that, in his opinion, the mere declarations of the executor did not stand on the same footing (*n*).

Admissions of executor not evidence against the administrator *durante absentia*.

SECTION VI.

Of other Temporary and Limited Administrations.

There are several other instances of temporary administrations granted as well *cum testamento annexo* as in cases of complete intestacy.

Temporary administrations:

It has already appeared that an executor may be appointed with limitations as to the time when he shall begin his office, as where a man is appointed to be executor at the expiration of five years from the death of the testator (*o*).

cum testamento annexo.

So the testator may appoint the executor of A. to be his executor: and then if he die before A. he has no executor till A. die (*p*).

in case of an executor limited as to time:

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office, the Court must commit administration limited until there be an executor (*q*). It is plain, that this will be an administration *cum testamento annexo*, and that the appointment will be made according to the rules connected with that sort of grant (*r*).

So it may be necessary to decree a limited administration till the Will of the deceased can be produced in order to be admitted to probate. Thus where the deceased, a few days before his

administration limited till a Will be transmitted to England:

(*m*) *Slater v. May*, Lord Raym. 1071.

(*n*) *Rush v. Peacock*, 2 Moo. & Rob. 162.

(*o*) *Ante*, p. 169.

(*p*) *Ante*, p. 169.

(*q*) Godolph. Pt. 2, c. 30, s. 5.

(*r*) See *ante*, p. 376 *et seq.*

death, stated that he had made his Will whilst in India; and that the same was then remaining there; administration was applied for "limited for the purpose of receiving and investing the interest and dividends due or to become due on certain stock of the deceased, and for receiving and investing the amount of an India Bill, and for otherwise protecting the property of the deceased," "until the last Will and testament of the said deceased, or an authentic copy thereof, should be transmitted to this country." Sir John Nicholl, on the consent of all parties apparently interested, granted the administration, and the learned judge observed, that the deceased could not be sworn to have died intestate, having, according to his own declaration, left a Will in India: An administration *pendente lite* was out of the question, as no suit in the Spiritual Court was or ever might be pending: nor could there be an administration as *durante absentia* or *minoritate* of an executor; for *non constat* who the executor was: At the same time a long interval must elapse before the Will would be forwarded from India, in which interval it was material there should be some one to protect and manage the property; and, therefore, the Court complied with the application (s).

limited till a
lost Will be
found:

Where a Will, proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, the Court will grant administration limited until the original Will be found, and brought into the registry (t).

limited during
the incapacity
of the execu-
tor or admin-
istrator or
next of kin,
&c.

If the executor be disabled from acting, as if he becomes lunatic, or incapable of legal acts, then, on the principle of necessity, there shall be a grant of a temporary administration with the Will annexed (u). Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the Court to make a limited grant to his committee, for his use and benefit,

(s) *In the goods of Metcalfe*, 1 Add. 343; *In the goods of Brown* (1899), 80 L. T. 360. See also 1 Gibs. Cod. 574, where it is said that, though there be no suit or controversy depending touching the executorship, and though there be an executor, yet, if he does not come in, the Ordinary may grant a temporary administration until the executor comes in and proves the Will.

(t) *In the goods of Campbell*, 2 Hagg. 555; *In the goods of Wright*, [1893] P. 21; *In the goods of Ponsonby*, [1895] P. 287; and see *Hewson v. Shelley*, [1914] 2 Ch. 13, 29.

(u) *Hills v. Mills*, 1 Salk. 36; Toller, 99; *ante*, p. 397. These are termed in 1 Oughton, tit. 219, s. 1, n. (a), "*Literæ administrationis durante Corporis aut Animi vitio*." As to incapacity through illness, see *In the goods of Ponsonby*, [1895] P. 287; *In the goods of Frenckley*, [1915] 2 Ir. R. 1.

during his lunacy (*v*). The sureties of the committee are not required to justify, nor is the committee required to file a declaration (*x*). By the consent, given or implied, of the committee of the lunatic, or without any consent if there be no committee, administration with the Will annexed may be committed to a residuary legatee, during the lunacy of the executor for the lunatic's use and benefit (*y*). A declaration of the estate and effects of the deceased must be filed in the Registry, and the sureties to the administration bond must justify (*x*).

Such grants for the use and benefit of an executor during his incapacity are equivalent to a grant of probate to him, and the chain of executorship is not thereby broken (*z*).

It is also the practice to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurs, the Court requires affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed: The Court will then grant administration to the next of kin of the lunatic, for the use and benefit of the lunatic, pending the lunacy; it requires sureties in double the amount of the property, and such sureties must justify (*a*), and the grantee must file a declaration (*b*).

So where the person solely entitled to administration with the will annexed or on intestacy is a lunatic, administration for his use and benefit is granted to his committee, or, if there is no

(*v*) *In the goods of Phillips*, 2 Add. 336, n. (*b*); *In the goods of Cooke*, [1895] P. 69. Where one of three executors, who had proved a Will, subsequently became of unsound mind, the Court, on the application of the others, revoked the grant and made a fresh grant of probate to the applicants, reserving power to the lunatic, in case he should become of sound mind and apply, to join in the probate: *In the estate of Shaw*, [1905] P. 92.

(*x*) See Probate Rules, 1862, Rule 42 (Non-contentious).

(*y*) *In the goods of Milnes*, 3 Add. 55.

(*z*) *In the goods of Frengley*, [1915] 2 Ir. R. 1.

(*a*) See *Ex parte Evelyn*, 2 Mylne & K. 4, where the practice was laid down, as above stated, by Lord Brougham, C., from a communication made to him by Dr. Lushington. See also *Evans v. Tyler*, 2 Robert. 134; *S. C.*, 7 Notes of Cas. 305, 306. Administration of the effects of a Jew was granted to the Secretary of the Great Synagogue, for the use and benefit of the next of kin (a Jewess), who was of unsound mind, during her lunacy, her next of kin having been first cited: *In the goods of Joseph*, 1 Curt. 907. Administration with the Will annexed *de bonis non* was granted to the executors of a sister, the administratrix, deceased, for the use and benefit of the surviving sister, the sole next of kin, during her imbecility, without citing her next of kin: *In the goods of Southmead*, 3 Curt. 28.

(*b*) See Probate Rules, 1862, rule 42 (Non-contentious).

committee, to his next of kin or heir-at-law, where there is real estate (c).

Where the committee, next of kin and heir-at-law of the lunatic renounce, or are cited and fail to appear, administration for the use and benefit of the lunatic may be granted to a creditor (d), or to a stranger (e).

Where administration had been granted of an intestate's effects to a creditor for the use and benefit of the widow, a lunatic, on the renunciation of her children; on the death of the creditor, leaving goods unadministered, the widow surviving and still lunatic, the Court refused to grant administration *de bonis non* to a son of the deceased, who had retracted his renunciation; but granted it to him for the use and benefit of the widow, during her lunacy, he giving justifying security to the amount of the goods unadministered (f).

In another case (g), the deceased died intestate in October, 1826, leaving his widow and several children him surviving: In the following November, administration was granted to his widow, who, in November, 1832, became a lunatic: In May, 1836, the Court was prayed to revoke the administration granted to the widow, and to grant an administration to the son of the deceased: The Court declined to revoke the administration; but granted administration to the son, limited during the lunacy of the widow, the letters of administration theretofore granted to her being first brought in and impounded in the Registry, in order to be re-delivered out in case of her recovery. And in the case of *In the goods of Cooke* (h), where a single administrator became insane and no committee was appointed, but a person had been appointed under sect. 116 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), with powers not of a general nature but relating only to certain specified property of the lunatic, the

(c) But a grant will not be made for the use and benefit of a lunatic unless all other persons equally entitled with the lunatic, whether as having an interest in real or personal estate, renounce, or are cited and fail to appear: Instructions under the Land Transfer Act, 1897, No. 14.

(d) *In the goods of Penny*, 1 Robert. 426. For grants to a creditor under sect. 73 of the Court of Probate Act, 1857, see *In the goods of Findlay*, 3 Sw. & Tr. 265; *In the goods of Eccles*, 15 P. D. 1; *In the goods of Hockin*, 73 L. T. 316; *In the goods of Everley*, [1892] P. 50.

(e) *In the goods of Hastings*, 4 P. D. 73; *In the goods of Joseph*, 1 Curt. 907.

(f) *In the goods of Penny*, 4 Notes of Cas. 659.

(g) *In the goods of Binckes*, 1 Curt. 286.

(h) [1895] P. 68.

Court made a grant to another of the next of kin for the use of the lunatic administrator limited to the period of his lunacy, the grant of administration to the lunatic being impounded.

If an executor, who is also residuary legatee in trust, be incapable, and no committee is appointed, the *cestui que trust* may obtain administration under certain circumstances (*i*). In a case where one of two executors had renounced, and the other was a lunatic under confinement, and there was no committee of her person and estate, the Court refused to grant administration to the residuary legatee, the daughter, during the lunacy of her mother, without the sureties in the bond justifying; no reason being given for the renunciation of the co-executor, nor any obstacle assigned to the formal appointment of a committee, to whom the administration for the use of the widow would regularly be granted (*k*).

Until the year 1824, *In the goods of Phillips* (*l*), no case of an application to the Court to supply a defect in the legal representation of the party deceased, occasioned by the lunacy of one of his several administrators, is believed to have occurred. In that case one of the three administrators, *cum testamento annexo*, was found to be a lunatic under a commission from the Court of Chancery, and committees had been appointed: There was standing in the name of the deceased, in the books of the Bank of England, certain sums, his property; but of which neither the interest could be received, nor the principal stock transferred, as directed by the Will, in consequence of such lunacy: Under these circumstances, the Court directed that upon the letters of administration already granted being brought in by the two sane administrators, and the committees of the third, letters of administration *de bonis non*, &c. should, by consent of the said committees, issue *de novo* to the two former administrators only (*m*). On the authority of this decision, the Court ordered, in a case where one of two joint administrators had become imbecile and incapable of acting, that the joint letters of administration, having been brought into the Registry, should be revoked, and special letters of administration granted to the sane administrator, without justi-

Case of one
of several
administra-
tors becoming
lunatic.

(*i*) *In the goods of Crump*, 3 Phillim. 497.

(*k*) *In the goods of Hardstone*, 1 Hagg. 487.

(*l*) 2 Add. 335.

(*m*) *Ibid.* 336.

lying securities (*n*). On another occasion (*o*), the deceased had appointed two executors, and probate had been granted to one, with a power reserved of making the like grant to the other: The executor who had obtained the grant became a lunatic, and a transfer of the deceased's stock at the Bank could not, in consequence, be obtained: A double probate was taken by the other executor, and the Court was prayed to revoke the probate granted to the lunatic, it having become inoperative: The Court directed both probates to be brought in, and then revoked them, and granted a fresh probate to the other executor, and therein reserved a power of making a like grant to the lunatic executor, when he should become of sound mind and apply for the same.

Administra-
tion limited
to a particular
subject:

There may also be a grant of administration limited to certain specific effects of the deceased; and the general administration may be committed to a different person. But it would seem that this sort of grant is entirely exceptional, and should not be made unless a very strong reason be given (*p*).

if there is an
executor there
can be no ad-
ministrator:

Two administrations may well subsist together when there is no executor: But it should be observed that, regularly, no administration of any sort can be granted when there is an executor appointed; for he is *universi juris hæres* to his testator: Therefore where A. made his Will, and appointed B. his executor, and by deed gave part of his estate to C.: and C. obtained in the Prerogative Court a limited administration to the deed only; the Judges Delegate set aside the grant of this administration on appeal (*q*).

(*n*) *In the goods of Newton*, 3 Curt. 428.

(*o*) *In the goods of Marshall*, 1 Curt. 297. See also *In the goods of Sowerby*, 65 L. T. 764; and *In the estate of Shaw*, [1905] P. 92.

(*p*) *In the goods of Watts*, 1 Sw. & Tr. 538; *In the goods of Somerset*, L. R. 1 P. & D. 350. Where a party applying for administration has no direct interest in the personal estate of the deceased, but only as assignee of part of it, the grant must be limited to the particular fund to which he is entitled: *In the goods of Dodgson*, 1 Sw. & Tr. 259. Again the Court granted administration with a Will and codicil annexed to a legatee of all property held by the deceased upon any trust, limited to such trust property, the executor and the next of kin having renounced probate and administration, and the deceased having died insolvent: *In the goods of Prothero*, L. R. 3 P. & D. 209. In the case of *In the goods of Butler*, [1898] P. 9, Sir Francis H. Jeune held, where a deceased died testate and administration was granted limited to leasehold property, which could not be dealt with without the appointment of a personal representative, that the grant should be made with the Will annexed. In the case of *In the goods of Baldwin*, [1903] P. 61, the Court made a grant of administration with the Will annexed, under sect. 73 of the Court of Probate Act, 1857, to the legatee, limited to the property described in the Will.

(*q*) *Coswall v. Morgan*, 2 Cas. temp. Lee, 571. See *post*. pp. 425, 426.

It frequently happens that the personal administration of a party deceased is broken, and its revival is necessary merely for the performance of a single act. In such cases, administration *de bonis non* will be granted, limited to that particular object. For instance, when the representatives of a trustee, in whom a term of years or charge was vested, are dead, no executor having been appointed by the survivor of them, a limited administration is requisite, for the purpose of making an assignment, and will be granted limited accordingly (*r*). So where a testator leaves the dividends on certain stock in the public funds to a legatee for life, and after his decease, the whole property to another, and makes the legatee for life executor, who dies intestate, administration *de bonis non*, with the Will annexed, may be obtained by the representative of the substituted legatee, limited to the sum in the funds, and the dividends due thereon since the death of the legatee for life (*s*). So administration with a Will annexed was granted to the joint nominees of two charitable institutions to whom legacies, expectant on life interests, had been bequeathed, but limited to a fund appropriated for payment of the legacies; the parties entitled to a general grant having been cited and not appearing (*t*).

Other instances of grants of administration limited to part of the property of the deceased are grants limited to such

administra-
tion limited
to assign a
trust term :

to a particular
legacy :

limited to
property
over which

(*r*) In cases where the original trustee died testate, it was not the practice of the Prerogative Office to annex the Will to an administration granted for this purpose: *In the goods of Fenton*, 3 Add. 36, n. (*a*). But see *In the goods of Butler*, [1898] P. 9. It is not sufficient, in order to make out a title to the term, to refer to deeds deducing such title in affidavits: the deeds themselves must be brought into the Registry: *In the goods of Keene*, 1 Sw. & Tr. 265.

(*s*) *In the goods of Steadman*, 2 Hagg. 59. But see *In the goods of Watts*, 1 Sw. & Tr. 539; and *In the goods of Lady Catherine Somerset*, 1 P. & D. 350; *ante*, p. 420, n. (*p*). On one occasion it appeared that a party had remitted from India a bill of exchange payable to the order of the deceased: The bill was accepted, but, previous to its arrival, the deceased died intestate, and his widow and children renounced administration: A grant was applied for to the nominee of the remitter of the bill, limited to receive and give a discharge to a third party for it: But the Court refused the motion, on the ground that it was in fact an application for a limited administration to be granted to the nominee of a debtor: *In the goods of Lord Rivers*, 4 Hagg. 355.

(*t*) *In the goods of Bion*, 3 Curt. 739; *Pegg v. Chamberlain*, 1 Sw. & Tr. 527; *In the goods of Ratcliffe*, [1899] P. 110; *In the goods of Agnese*, [1900] P. 60. Where there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trust* assent to the grant extending to their respective interests: *Pegg v. Chamberlain*, *ubi supra*.

deceased had
a power of
appointment:

property as the deceased had power to dispose of, and did dispose of, by virtue of a power of appointment. Such grants may be made to the appointee under the Will of a foreigner in cases where the Will, though valid as the exercise of a power of appointment, is not well executed according to the requirements of the law of the testator's domicile, and is therefore invalid in other respects (*u*); or where a Will has been revoked by marriage except in so far as it exercised a power of appointment saved from revocation by the Wills Act, 1837, s. 18 (*x*).

to property
acquired after
separation:

Again, a grant may be made to the next of kin of a married woman limited to property acquired by her since the date of a judicial separation (*y*), or under the provisions of a deed of separation by which it has been agreed that if the wife shall die intestate, her next of kin shall be entitled to property acquired by her after the separation (*z*).

limited to
proceedings
in Chancery:

Again, an administration may be granted, limited to commencing or substantiating proceedings in Chancery (*a*).

Again, if a debt, by a covenant or obligation binding the heir of the debtor, is demanded in equity against the real assets in the hands of a devisee, under the statute 3 W. & M. c. 14, (repealed and re-enacted with additional provisions by the Debts Recovery Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 47)), the personal representative of the deceased debtor is generally a necessary party to the suit, as a Court of Equity will first apply the personal in exoneration of the real assets (*b*). And when there has been no general personal representative, a special representative by an administration limited to the

(*u*) *Vide ante*, p. 278; and as to the form of grant where the testatrix was a married woman, see *In the goods of Tréfond*, [1899] 247; *In the goods of Vannini*, [1907] P. 330.

(*x*) See *In the goods of McVicar*, L. R. 1 P. & D. 671; *In the goods of Russell*, 15 P. D. 111. But in *Poole v. Poole*, [1919] P. 10, where there was a contest for the grant between the receiver in lunacy of the appointee and the testator's widow, the Court made a general grant of administration to the widow with so much only of the Will annexed as related to the appointed fund.

(*y*) *Vide ante*, p. 321.

(*z*) *Vide ante*, p. 323.

(*a*) *Woolley v. Green*, 3 Phillim. 314; *Maclean v. Dawson*, 1 Sw. & Tr. 425; *In the goods of Dodgson*, 1 Sw. & Tr. 259; *Burdon v. Morgan*, L. R. 2 P. & D. 371. But the appointment of an administrator *ad litem* is now in many cases unnecessary; for by R. S. C. Ord. XVI. r. 46, the Court may appoint some person to represent the estate of the deceased, or proceed in the absence of any such person. See *post*, Pt. v. Bk. II. Ch. II. p.

(*b*) See *In re Atkinson*, [1908] 2 Ch. 307; and Mitford, Plead. 203, 5th edit.; *post*, Pt. IV. Bk. I. Ch. II. § 1.

subject of the suit has been required (c). In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the Court. This seems to be required rather to satisfy the Court that there are no such assets to satisfy the demand: for although the limited administrator can collect no such assets by the authority under which he must act, yet as the person entitled to general administration must be cited in the Ecclesiastical Court, before such limited administration can be obtained, and as the limited administration would be determined by a subsequent grant of general administration, it must be presumed that there are no such assets to be collected, or a general administration would be obtained (d).

So where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the Court to proceed to a decision on the claim. And when a right is clearly vested, as a trust term, which is required to be assigned, an administration of the effects of the deceased trustee, limited to the trust term, is necessary to warrant the decree of the Court for assignment of the term (e).

¹But where a testatrix had a power of appointment, and a general probate of her Will of 1829, and codicil thereto, had been granted, the Delegates, reversing a decree of the Prerogative Court, held that the Court could not also grant an administration with a Will of 1815 and codicils annexed, limited to become a party to proceedings in equity, touching the execution of the power by such Wills: but must itself decide whether the Will of 1815 was, under the circumstances, revoked by the Will of 1829, and thereupon grant either a probate of the Will and codicil of 1829 alone, or a probate of those papers and the Will of 1815 and its codicils, as together containing the Will (f).

It may be here observed, that in these cases the Court will not grant a *general* administration, but only an administration

(c) Mitf. Plead, 204, 5th edit.

(d) *Ibid.*

(e) *Ibid.* 205.

(f) *Hughes v. Turner*, 4 Hagg. 30. See also *Brenchley v. Lynn*, 2 Robert. 441; accord. *ante*, p. 302. See also p. 126.

limited for the purpose of substantiating and carrying on the proceedings in Chancery. On one occasion (*g*) a defendant in a suit in equity having died intestate, Sir H. Jenner Fust refused to make a *general* grant of administration to a nominee of the plaintiffs in the suit, though the Vice-Chancellor (Sir L. Shadwell) had held (*h*) that an administration limited to substantiate proceedings (which had been previously granted) was insufficient, and had directed the cause to stand over to enable the plaintiff to cure the objection by obtaining a general grant.

But the decision of the Vice-Chancellor was afterwards overruled by Lord Cottenham, on a careful consideration of the authorities (*i*); and it appears to be now settled, that if the grantee of such limited letters is made a party to the suit, the estate of the deceased is properly represented, so as to enable the Court to proceed in the cause; and a decree obtained against such an administrator will be binding on any future grantee of general letters of administration (*k*).

With respect to the power and interest of such administrators, a question arose in the case of *Brant v. King* (*l*), before Sir Launcelot Shadwell, V.-C., March 31, 1829: In that case a bill had been filed by persons claiming certain Bank Annuities standing in the name of a trustee, who, pending the suit, died abroad, not leaving any personal representative in this country: Administration was therefore granted by the Prerogative Court

(*g*) *In the goods of Chanter*, 1 Robert. 273.

(*h*) *Davis v. Chanter*, 14 Sim. 212.

(*i*) 2 Phil. Ch. C. 545.

(*k*) See accord.; *Faulkner v. Daniel*, 3 Hare, 199, 208; *Ellice v. Goodson*, 2 Coll. 4. That is to say, it binds the general administrator when appointed as to the particular question involved in the action, but, if the relief sought for is general administration, a general administrator has always been required: and this rule has in no way been altered by the Judicature Act. Thus in *Dowdeswell v. Dowdeswell*, 9 C. D. 294, although the only object of the suit was to establish the title of the plaintiff as sole next of kin, the Court held that a general administrator of the intestate's estate was a necessary party to the suit and that the intestate was not sufficiently represented by an administrator *ad litem*. But see *In re Mastelloni*, [1917] W. N. 253. And an administrator *ad litem* of a married woman does not sufficiently represent her separate estate, to enable the Court to decide how far that estate is liable in respect of her acts as trustee: *Shipton v. Rawlins*, 4 De G. & Sm. 477.

(*l*) *Ex relatione* Mr. Wilson, of counsel in the cause. As a general proposition, an administrator *ad litem* represents the estate to the extent of the authority which the letters of administration purport to confer. See Daniell's Chancery Practice, 8th edit. p. 156.

the estate of the deceased is properly represented in a suit in Chancery by an administrator limited to substantiate proceedings in equity:

power, &c. of such an administrator:

of Canterbury, to a person residing in England, "limited for the purpose only to attend, supply, substantiate, and confirm the proceedings already had or that may be had in the cause, in the High Court of Chancery, or any other cause which may be commenced, touching the matters at issue in the cause, and until a final decree shall be made therein, and the decree carried into execution, and the execution thereof fully completed" (*m*). On the petition of the plaintiff, the Vice-Chancellor made an order that the Bank of England should pay to the limited administrator (who had been made a party to the suit by supplemental bill), the dividends in arrear, and that he should pay thereout the costs of obtaining the administration and of the order; and that the limited administrator should transfer (and the Bank permit the transfer) the stock to the Accountant-General in trust in this case: Mr. Horne, for the Bank, suggested a doubt whether an order for payment and transfer could be made in the case of a limited administrator, it not having been the practice of the Bank to pay dividends to, or permit a transfer by, such an administrator: But the Vice-Chancellor thought the application proper, and made the order, observing, that, otherwise a limited administration would be useless (*n*).

In cases of such limited administrations, the parties entitled to the general grant may take out a *cæterorum* representation (*o*). *cæterorum representation.*

Further, such limited administrations in strictness ought not to be granted without either the *regular* renunciation (*p*) of the party entitled, according to the practice of the Court, to the general grant; or a citation of such party "to accept or refuse:" But under peculiar circumstances this seems to have been some- Citation of party entitled to the general administration before limited grant.

(*m*) This appears to be the usual form of letters of administration limited to substantiate proceedings in Chancery. See 2 Phil. Ch. C. 549, 550.

(*n*) This case was cited and recognized by Lord Cottenham in *Davis v. Chanter*, 2 Phil. Ch. C. 551.

(*o*) *Harris v. Milburn*, 2 Hagg. 62; *In the goods of Brown*, L. R. 2 P. & D. 455. But see *In the goods of Currey*, 5 Notes of Cas. 54; *infra*, p. 426, note (*r*), in which the Court declined to make a *cæterorum* representation.

(*p*) *In the goods of Fenton*, 3 Add. 35, where a renunciation was considered insufficient, because unaccompanied by the original Will of the deceased.

times dispensed with (*q*). However, on one occasion (*r*), where a testator died in 1823, and no step was taken to prove his Will till 1846, and in the meantime an administration had been obtained limited to his interest in the remainders of two terms, on an allegation that he was dead intestate, without citation of, or renunciation by, the parties entitled to the general grant; the Court refused a *cæterorum* probate to the sole executrix, and stopped the practice of making such grants of administration for the assignment of terms without citation.

In the case of *Harris v. Milburn* (*s*), the testator died in March, 1827, having made a Will, appointing two executors, and leaving his only two children, daughters, both married, his residuary legatees: A suit in Chancery against the deceased abated by his death: From time to time search was made on the part of the suitor in Chancery, if any Will had been proved, or administration taken, but without success: and in October, 1827, his solicitor wrote to the husbands of the daughters, inquiring whether they would take out administration, and apprising them of the necessity of obtaining a personal representative to the deceased's estate: Similar communications had been made to the solicitor and nephew of the testator; apprising them also of an intended application to the Court; but no answers were returned: A decree with intimation was then extracted, calling upon the daughters to show cause why an administration should not be granted to a nominee of the suitor in Chancery, limited to substantiate proceedings there: Every reasonable effort was made to serve the decree on the daughters, but the husband of one would not permit access to his wife, and would give no information as to the other sister, whose residence could not be discovered: In December, 1827, the limited administration was decreed, and the proceedings in Chancery were revived: In Easter Term, 1828, the executors, who at last proved the Will, called in the administration, on the ground that the decree was not personally

(*q*) *Skeffington v. White*, 1 Hagg. 699; *In the goods of Steadman*, 2 Hagg. 59. But see *Skeffington v. White*, 2 Hagg. 626; *ante*, p. 391. See also *In the goods of Watts*, 1 Sw. & Tr. 538, where a limited grant was refused, although the parties entitled to a general grant were more than nine in number, and their residences were widely apart, and their service with a citation would be attended with great difficulty and expense. And see *In the goods of Lady Catherine Somerset*, 1 P. & D. 350.

(*r*) *In the goods of Currey*, 5 Notes of Cas. 54.

(*s*) 2 Hagg. 63.

served: But the Court, on petition, directed it to be redelivered out, and condemned the executors in costs; observing that the regular course would have been to take probate *cæterorum*, and if there was any fear of collusion, the executors might have intervened in the Chancery suit.

Upon the death intestate of an employer before an application for arbitration under the Workmen's Compensation Act, 1906, had been made by an injured workman, the next of kin of the employer refusing to take out letters of administration, a grant was made by the Irish Court to the nominee of the workman under sect. 78 of the Irish Probate Act, 1857 (identical with sect. 73 of the English Act), limited to substantiating proceedings under the Workmen's Compensation Act, 1906 (*t*).

Administration limited to proceedings under Workmen's Compensation Act, 1906.

Finally, an administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another (*u*).

Administration limited to a particular place.

It might happen, under the old practice, that a man dying possessed of goods in two provinces made his Will of the goods only in one of them, and died intestate as to the goods in the other province; and in such case administration might have been granted as to the goods whereof he died intestate (*x*).

(*t*) *In the goods of Byrne* (1910), 44 Ir. L. T. Rep. 98.

(*u*) Bac. Abr. Executor (C. 4); Toller, 106. See *In the goods of Mann*, [1891] P. 293. And see *In the goods of Tamplin*, [1894] P. 39; and *In the estate of Von Brentano*, [1911] P. 172.

(*x*) Godolph. Pt. 2, c. 30, s. 5.

CHAPTER THE FOURTH.

OF THE ADMINISTRATION BOND.

IN this Chapter it is proposed to consider the security required of an administrator, upon administration being committed to him.

The statute 21 Hen. VIII. c. 5, s. 3, directs the Ordinary to grant administration, "taking surety of him or them to whom shall be made such commission:" and the statute 22 & 23 Car. II. c. 10, s. 1, further provides, that "all Ordinaries, as well as the Judges of the Prerogative Courts of Canterbury and York for the time being, as all other Ordinaries and Ecclesiastical Judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administrations of the goods of persons dying intestate, after the first day of June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties (*a*), respect being had to the value of the estate, in the name of the Ordinary, with the condition in form and manner following, "*mutatis mutandis*, viz.

"The condition of this obligation is such, that if the within-bounden, A. B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased which have or shall come to the hands, possession or knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of Court, at or before the day of next ensuing:"

(*a*) By the practice of the Prerogative Court of Canterbury, a husband, taking administration to his deceased wife, entered into bond with one surety: *In the goods of Noel*, 4 Hagg. 208. This is still the practice. (Rule 39: N.-C. B.)

Practice before the Court of Probate Act, 1857.

Bond to the Ordinary by administrator under stat. 22 & 23 Car. II.

conditioned

to make a true inventory, &c.;

“And the same goods, chattels and credits, and all other the goods, chattels, and credits of the said deceased at the time of his death, which, at any time after, shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law.”

to administer well and truly :

“And further do make or cause to be made, a true and just account of his said administration at or before the day of : And all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator’s account, the same being first examined and allowed of by the Judge or Judges for the time being of the said Court, shall deliver and pay unto such person or persons respectively as the said Judge or Judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint.”

to make a true and just account of his administration :

to deliver and pay the residue as the judge shall appoint :

“And if it shall hereafter appear, that any last Will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court: Then this obligation to be void and of none effect, or else to remain in full force and virtue.”

and to deliver the letters, if a Will shall appear.

“Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any Courts of Justice.”

But the 80th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), repealed so much of the above statutes as requires any surety, bond or other security to be taken from a person to whom administration shall be committed.”

Repealed by Court of Probate Act, 1857.

20 & 21 Vict. c. 77, s. 80.

And by sect. 81 of the Court of Probate Act, 1857, as amended by the Grant of Administration (Bonds) Act, 1919 (9 & 10 Geo. V. c. 26), “Every person to whom any grant of administration shall be committed shall give bond to the Judge of the Court of Probate, or in the case of a vacancy in that office to a registrar of the principal Probate Registry (b),

Sect. 81.

Persons to whom grants of administration shall be committed shall give bond.

(b) The words in italics were added by the Grant of Administration (Bonds) Act, 1919 (9 & 10 Geo. V. c. 26), s. 1 (1) of which Act provides: “The bond required under sect. 81 of Court of Probate Act, 1857, to be given by a person to whom a grant of administration has

“to enure for the benefit of the Judge for the time being, and,
 “if the Court of Probate or *a registrar* (c) shall require, with
 “one or more surety or sureties conditioned for duly collecting,
 “getting in and administering the personal estate of the de-
 “ceased (d), which bond shall be in such form as the Judge
 “shall from time to time by any general or special order direct;
 “provided, that it shall not be necessary for the solicitor for
 “the affairs of the Treasury or the solicitor of the Duchy of
 “Lancaster applying for or obtaining administration to the
 “use or benefit of her Majesty to give any such bond as afore-
 “said” (e).

Sect. 82.
 Penalty on
 bond.

By sect. 82, “Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or *a registrar* (f), as the case may be, shall in any case think fit to direct the same to be reduced (g), in which case it shall be lawful for the Court or *a registrar* (f) so to do; and the Court or *a registrar* (f) may also direct that

been committed may, during any vacancy in the office of President of the Probate, Divorce and Admiralty Division of the High Court, be given to a registrar of the principal Probate Registry.”

(c) The words in italics were substituted for the words, “in the case of a grant from the district registry the district registrar,” in the original Act by the Grant of Administration (Bonds) Act, 1919 (9 & 10 Geo. V. c. 26), s. 1 (2) of which Act provides: “The powers of a district registrar under the said Act to require sureties to such a bond, and to reduce the amount of such a bond, and to limit the liability of a surety shall be exerciseable in the case of a grant of administration from the principal Probate Registry by a registrar of that registry.”

(d) Since the Land Transfer Act, 1897: “All the estate which by law devolves to and vests in the personal representative of the deceased.”

(e) Where, however, administration is granted to the Treasury Solicitor he shall, notwithstanding that he does not give the bond which if such administration had been granted to him as a private individual he would be required by law to give, be subject as regards the administration to the liabilities and duties imposed by such bond: Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 2. And an exactly similar provision applies to administration granted to the Solicitor of the Duchy of Lancaster (39 & 40 Vict. c. 18, s. 9. and Sched. II.). See *ante*, p. 345. And see, as to the Public Trustee, the Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 11 (4).

(f) The words “a registrar” substituted for the words “district registrar” in the original Act by the Grant of Administration (Bonds) Act, 1919 (9 & 10 Geo. V. c. 26). See the provisions of sect. 1 (2) of that Act, quoted *supra*, note (c).

(g) The penalty is now, in cases coming within the Land Transfer Act, 1897, double the gross principal value of the personal estate, plus double the gross *annual* value of the real estate. Direction: February, 1898. In a case where an intestate left 3,000*l.*, and 45*l.* of debt, and his mother solely entitled in distribution, the Court granted

more bonds than one shall be given (*h*), so as to limit the liability of any surety to such amount as the Court or a registrar (*i*) shall think reasonable."

By sect. 83, "The Court may, on application, made on *summons* (*k*), and on being satisfied that the condition of any such bond has been broken, assign the same to some person to be named in such order (*l*), and such person, his executors or

Sect. 83.
Power of
Court to
assign bond.

administration on the mother entering into a bond in the amount of 100*l*. with sureties: *In the goods of Gent*, 1 Sw. & Tr. 54. Where administration was granted merely to enable a personal representative of the deceased to execute a formal release to the trustee under a marriage settlement the Court allowed the property to be sworn under 20*l*.: *In the goods of Staupoole*, 2 Sw. & Tr. 316. In a case where a second or *cessate* grant (that is, a grant made on the ceasing of a prior grant made for a limited time or until a particular event happens) was required for 300*l*., the value of two shares, the only property not distributed, the whole estate under the original grant having been sworn under 3,000*l*., the Court accepted a bond in a penalty of 600*l*., being double the value of the two shares: *In the goods of Fozard*, 3 Sw. & Tr. 173. Where an estate had been partly administered, and a further bond became necessary, the Court allowed the administrator to take the grant for the amount then due to the estate, and to give security only for double that amount: *In the goods of Halliwell*, 10 P. D. 198. And see *In the goods of Cormack*, [1891] P. 151; *In the goods of Oakey*, [1896] P. 7. And where an estate was being administered in the Chancery Division and an order had been made that each individual share of the estate should be paid directly to the parties entitled, the Court allowed the penalty of the administration bond to be limited to double the amount of the beneficial interest of the applicant: *In the goods of Paxton*, 14 P. D. 40; *In the goods of Bennison*, *ibid*.

(*h*) See *In the goods of Weir*, 1 Sw. & Tr. 506, where a sum of money had been received by the administrator which made it necessary to re-swear the amount for which administration was taken out, and the Court under this section directed an additional bond, which would, together with the original one, be double the amount under which the estate was to be re-sworn. And in a case where the property was large and the risks small, the Court refused to dispense with sureties to a bond or to lessen the amount secured, but allowed the security to be made up of any number of bonds: *In the goods of Earle*, 10 P. D. 196.

(*i*) See *ante*, p. 430, note (*f*).

(*k*) Sect. 83 of the Court of Probate Act, 1857, as it originally stood read as follows: "The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same . . ." etc. By the Grant of Administration (Bonds) Act, 1919 (9 & 10 Geo. V. c. 26), the word "*summons*" was substituted for the words "motion or petition in a summary way," and the words "order one of the registrars of the Court to" were omitted. By sect. 1 (3) of that Act, "an application for the assignment of such a bond to some person in order to enable him to sue on it may be made to a registrar of the principal Probate Registry on *summons*."

(*l*) See *In the goods of Jones*, 3 Sw. & Tr. 28; *Baker v. Brooks*, *ibid*, 32; *In the goods of Young*, L. R. 1 P. & D. 186, where it is

administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court or a registrar (*m*), and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach of the condition of the said bond." Applications under this section are now made to a registrar by summons (*n*).

Creditor who is assignee of bond may sue in his own name.

In the case of *Sandrey v. Michell* (*o*), the Court of Queen's Bench appears to have been of opinion that the Court of Probate Act made no alteration in the law beyond this, that it enabled a creditor on having the bond assigned to him to sue in his own name.

What is a breach of the condition of such bond.

In that case the action was against sureties to a bond conditioned according to the form given by the rule made in pursuance of the 81st section of the Court of Probate Act (*p*), and which consequently contained, as part of the condition, the terms (not to be found in the bond given under the statute of Charles), that *the administrator shall pay the debts which the deceased owed at his death*: The action was brought by a creditor, to whom the bond had been assigned under sect. 83, and the declaration alleged that assets came to the hands of the administrator, and that he had wasted the same, and did not pay the debt of the plaintiff: The plea was that the only breach of the condition of the bond was the non-payment of the debt to the plaintiff: The replication was, that the administrator had wasted assets of the deceased sufficient to pay the debt: And the Court of Queen's Bench held, that the defendant was entitled to judgment, as the bond could only be enforced for the general benefit of persons interested in the estate of the intestate, and not for the non-payment of a particular debt (*q*).

decided that the Court will allow an administration bond to be assigned upon being satisfied that the application for the order is made *bonâ fide* and that a *primâ facie* case is made out and that the applicant is the proper person to whom the bond should be assigned.

(*m*) The words in italics were inserted by the Grant of Administration (Bonds) Act, 1919. *Vide supra*, p. 429, note (*b*).

(*n*) See *Cope v. Bennett*, [1911] 2 Ch. 488.

(*o*) 3 B. & S. 405. And see *Cope v. Bennett*, [1911] 2 Ch. 488.

(*p*) See *ante*, p. 429.

(*q*) The Court gave leave to amend the declaration, so that the plaintiff should sue as trustee under the 83rd section. As to breach of condition, well and truly to administer, see *Dobbs v. Brain*, [1892] 2 Q. B. 207; *Archbishop of Canterbury v. Robertson*, 1 Crompt. & M. 181; *In re Bennett*, [1907] 1 K. B. 149; *Blake v. Bayne*, [1908] A. C. 371. As to the form of bond given by a creditor, *vide ante*, p. 353.

By the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 15, "bonds given before 11 Jan. 1858, are to remain in force" (*r*).

Bonds given before Jan. 11, 1858, to remain in force.

Where the administration is not within the statute 21 Hen. VIII. c. 5, as in the case of an administrator *durante minore ætate* with the Will annexed (*s*), or other grant of administration when the deceased dies intestate, and the Ordinary had taken a bond from the administrator, conditioned for the due payment of debts and legacies, a breach might well be assigned that, though he had more than sufficient to pay all the debts, he has not paid a legacy (*t*).

Breach of bond given when the administration is not within 21 Hen. VIII.:

Where a party had obtained from the Prerogative Court a general order to put the administration bond in suit against the surety, the Court of Common Law, in which the action was brought, could not restrain the party so empowered from suggesting as many breaches as he chose, notwithstanding it may appear, on affidavit, that the order was obtained from the Spiritual Judge solely on one particular ground (*u*).

how many breaches might be assigned:

An administratrix entered into the usual bond in the Prerogative Court to exhibit an inventory within a limited time, &c.: The time having elapsed without an inventory being exhibited, a creditor puts the bond in suit in the name of the archbishop, and the administratrix filed her bill for an injunction; which was granted on the terms of her giving judgment in the action, which was to stand as a security for costs at law and in equity (but not for the debt), and amending the bill by submitting to account (*x*).

how far equity will relieve against forfeiture of the bond:

(*r*) See *Young v. Hughes*, 4 H. & N. 76; also *Young v. Oxley*, 1 Sw. & Tr. 25. It seems to have been the opinion of Martin, B., and Channell, B., that the 87th section of the Court of Probate Act, 1857, shows an intention to transfer to the Court of Chancery the jurisdiction over such a bond: 4 H. & N. 84, 86; *sed quære de hoc*. See *Bouverie v. Maxwell*, L. R. 1 P. & D. 272, where it was held that the Court of Probate had no jurisdiction to compel administrators, who had taken out administration in an Ecclesiastical Court, to file inventories and accounts in the Registry of the Court; such inventories and accounts being by virtue of the 87th section returnable only into the Court of Chancery.

(*s*) See *ante*, pp. 377, 393.

(*t*) *Folkes v. Docminique*, 2 Stra. 1137.

(*u*) *Archbishop of Canterbury v. Robertson*, 1 Crompt. & M. 181. See the observations of Sir H. Jenner Fust in *Crowley v. Chipp*, 1 Curt. 460.

(*x*) *Thomas v. Archbishop of Canterbury*, 1 Cox, 399. See also *Bolton v. Powell*, 2 De G. M. & G. 1, 17.

Stat. 20 & 21
Vict. c. 77,
s. 81:
dispensing
with sureties.

It must be observed that under the 81st section of the Court of Probate Act, 1857 (*y*), the Court has power to dispense with sureties altogether (*z*), but the Court has no power to dispense with the bond (*a*).

Public
Trustee:

Where administration is granted to the Public Trustee, he is by statute not required to give bond or security, but is subject to the same liabilities and duties as if he had given such bond or security. (Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 11 (4)) (*b*).

Bond by ad-
ministrator
pendente lite.

In an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the Court will not dispense with such administrators entering into a joint bond (*c*).

Administra-
tion bond
when ad-
ministrator
is out of
England.

Whether in
such case the
sureties must
be resident
within the
kingdom.

If the administration be committed to a person out of England, it used to be requisite that the sureties to the bond should be resident within the kingdom (*d*).

When this rule was established the assignee of the bond could not have served the sureties out of England with process. But by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 18, service on a person abroad could be effected. And

(*y*) *Ante*, p. 429.

(*z*) Sureties were dispensed with where the estate was being administered by the Court of Chancery: *Cleverley v. Gladdish*, 2 Sw. & Tr. 335; *In the goods of De la Farque*, *ibid.* 631; *In the goods of Wilcocks*, 67 L. T. 528; *In the goods of Leach*, 80 L. T. 170; but see *Jackson v. Jackson*, L. R. 1 P. & D. 12; *In the goods of Paxton*, 14 P. D. 40. Where the proposed administrator was a nominee of a public department: *Solicitor of the Duchy v. Canning*, 5 P. D. 114; *In the estate of Bryan*, [1905] P. 88; or the official receiver in bankruptcy: *Belcher v. Maberley*, 2 Curt. 629; *In the goods of Cope*, 15 P. D. 107; *In the estate of Astbury*, 80 L. T. 296; *In the estate of Thacker*, [1900] P. 15; *In the estate of Causton*, [1906] P. 124; *In the goods of Renninson*, 1 Manson, 475; *In the estate of Bowron*, 84 L. J. P. & M. 92; or entitled to the whole estate: *In the goods of Allen*, [1893] P. 184; *In the estate of Paton*, [1901] P. 188; *In the estate of Unwin*, 87 L. T. 749; and see *In the estate of Harper*, [1909] P. 88. And see *In the goods of Cormack*, [1891] P. 151; *Askew v. Askew*, *ibid.* 174; *In the goods of Cory*, [1903] P. 62; *In the estate of the King of Siam*, 107 L. T. 589. The Court will not dispense with sureties by reason of the property being large and the risk small: *In the goods of Earle*, 10 P. D. 196; *In the goods of McGowan*, 10 P. D. 197.

(*a*) *In the goods of Powis*, 34 L. J. P. & M. 55.

(*b*) See *In the estate of Woolley*, 55 S. J. 220.

(*c*) *Stanley v. Bernes*, 1 Hagg. 221. But see sect. 82 of the Court of Probate Act, 1857, *ante*, p. 430.

(*d*) *In the goods of O'Byrne*, 1 Hagg. 316. See also *Cambiaso v. Negrotto*, 2 Add. 439, as to bonds on grants of administration to foreigners.

the rule was consequently relaxed (*e*). The procedure as to service of process out of the jurisdiction is now governed by R. S. C. 1883, Ord. XI., which has taken the place of the provisions of sect. 18 of the Common Law Procedure Act, 1852.

Where there has been an administration *durante minore ætate*, and the minor coming of age takes upon himself the administration, he is obliged to give security to the same amount that the administrator did in the first instance (*f*).

Administra-
tion bond
when minor
comes of age.

Justifying securities to the administration bond are called for at the Court's discretion according to the circumstances of each case; except that there is one general rule, that where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required (*g*). Where the sureties are required to justify in the ordinary course of practice, the Court will not dispense with this, even partially, except under very special circumstances (*h*).

Justification
of sureties to
the bond :

Where the application that the sureties may be directed to justify is made on behalf of a next of kin, the Court feels bound to grant it; but it may be sufficient for the sureties to justify in respect of the share of the party excluded from the administration (*i*).

Where administration *cum testamento annexo* was granted to the next of kin, on the ground of there being no executor or residuary legatee who survived the testator, the party, who had unsuccessfully claimed the administration derivatively from the residuary legatee, prayed that the sureties to the administration bond of the next of kin might be compelled to justify; but the Court rejected the application, as contrary to the established practice (*k*).

next of kin
administrator
*cum testamento
annexo :*

But a residuary legatee for life, taking administration with the Will annexed, may be compelled to procure justifying

residuary
legatee :

(*e*) *In the goods of Reed*, 3 Sw. & Tr. 439; *In the goods of Fernandez*, 4 P. D. 229. And see *post*, p. 438.

(*f*) *Abbott v. Abbott*, 2 Phill. 578.

(*g*) *Aitkin v. Ford*, 3 Hagg. 194, n. (*a*); *In the goods of Milligan*, 2 Robert. 108.

(*h*) *Howell v. Metcalfe*, 2 Add. 348. The mere fact that a receiver of the personal estate had been appointed by the Court of Chancery according to the practice before the Judicature Act, was no ground for the dispensation: *Jackson v. Jackson*, L. R. 1 P. & D. 12; 35 L. J. P. & M. 3.

(*i*) *Coppin v. Dillon*, 4 Hagg. 376.

(*k*) *Taylor v. Diplock*, 2 Phill. 280.

sureties (*l*). On another occasion, the Court refused, on renunciation of a co-executor, to grant administration with the Will annexed, without justifying sureties, to the daughter, the residuary legatee, during the lunacy of her mother, the other executor and residuary legatee in trust (*m*).

legatee :

Administration *de bonis non* with a Will annexed, in which was no executor, was granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee; the sureties justifying in the amount of the surplus beyond the interest of the one legatee or (on a proxy of consent from the other) beyond the joint interests, and an affidavit of no outstanding debts being made (*n*).

husband resident abroad :

A husband, resident abroad, was directed, on the application of creditors, to find justifying sureties resident within the jurisdiction, on taking a grant of administration to his wife (*o*).

temporary administrator :

There may also be justifying sureties required to the administration bond in cases of temporary general administration; as *durante minore ætate* (*p*); or on a grant to a widow, where there is a minor daughter entitled in distribution, limited till a lost Will is found (*q*); or on a grant, with the Will annexed, to a residuary legatee to the use and benefit of a lunatic, pending the lunacy (*r*); or in cases of presumption of death.

under the old practice the Court would not allow separate bonds.

Under the old practice if the Court decreed a general grant, but, under special circumstances, required the sureties to justify only as to a *part* of the property, it would not allow *separate* bonds, so that *other* sureties than those who *justified* in the requisite amount entered into the *common* administration bond, in the double amount of the *whole* property (*s*).

(*l*) *Friswell v. Moore*, 3 Phillim. 139.

(*m*) *In the goods of Hardstone*, 1 Hagg. 487. See also *In the goods of Williams*, 3 Hagg. 217.

(*n*) *Pickering v. Pickering*, 1 Hagg. 480.

(*o*) *In the goods of Noel*, 4 Hagg. 207.

(*p*) *Howell v. Metcalfe*, 2 Add. 350.

(*q*) *In the goods of Campbell*, 2 Hagg. 555.

(*r*) *Ante*, p. 416.

(*s*) *Howell v. Metcalfe*, 2 Add. 348. But see now s. 82 of the Court of Probate Act, *ante*, p. 430. See further as to the practice respecting the sureties to administration bonds: *Bond v. Bond*, 1 Cas. temp. Lee, 429; *Allen v. Allen*, 2 Cas. temp. Lee, 244. *Semble*, it is not contrary to public policy that the sureties should be indemnified by the next of kin: *Blake v. Bayne*, [1908] A. C. 371. See further as to the practice with respect to suing on administration bonds: *In the goods of Bawden*, 3 Sw. & Tr. 25; *In the goods of Irving*, L. R. 1 P. & D. 658. As to the liability of sureties where the grant is afterwards revoked, see *Debendra Nath Dutt v. Adm.-Genl. of Bengal*, 99 L. T. 68.

Where a person is authorised by a simple power of attorney to take out administration as agent for the use and benefit of a party entitled to administration who is abroad, the Court will only grant administration to the agent on the same terms as it would have granted it to the party himself, and, therefore, will not alter the usual conditions of the administration bond or the terms of the ordinary administration oath (*t*).

Administration bond by attorney of next of kin.

In a case decided before the Married Women's Property Act, 1882, the husband of a married woman who was entitled to administration refused to execute the administration bond or to assist her in obtaining the grant, and the Court granted administration to her and allowed a third person to execute the bond (*u*). Where the administrator was in Japan, and a considerable sum became payable to the estate of the deceased under an order of the Court of Chancery, the Court allowed another person to file an affidavit as to the increase of property, and to execute the bond to cover the increased duty (in the place of the administrator), with two sureties on the understanding that as soon as possible the administrator should execute a similar bond (*x*).

Administration bond by a third person for a wife entitled to administration when the husband refused to execute one. Third person allowed to file affidavit of increase and execute bond.

The Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them (*y*).

Court will not discharge original sureties.

It remains to mention such rules of the Court of Probate as apply to administration bonds.

By rule 38, P. R. (Non-contentious Business), "Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95 (*z*); but in no case are they to be attested by a proctor, solicitor, attorney, or agent of the party who executes them. The signature of

Rule 38, P.R. (Non-contentious Business). Who are to attest the bond.

(*t*) *In the goods of Goldsborough*, 1 Sw. & Tr. 295.

(*u*) *In the goods of Sutherland*, 4 Sw. & Tr. 189. Since the Married Women's Property Act, 1882, however, when a married woman is administratrix, it is not necessary that her husband should join in the administration bond; the husband incurring no responsibility, and the grant conferring no benefit upon him: *In the goods of Ayres*, 8 P. D. 168.

(*x*) *In the goods of Ross*, 2 P. D. 274.

(*y*) *In the goods of Stark*, L. R. 1 P. & D. 76. And see *In the goods of Cowardin* (1902), 86 L. T. 261.

(*z*) See now, the Commissioners for Oaths Acts, 1889 and 1891 (52 & 53 Vict. c. 10, and 54 & 55 Vict. c. 50).

the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix" (a).

Rule 39.
Number of
sureties and
amount of
bond.

By rule 39, "In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant (b). The alleged value of such property is to be verified by affidavits if required."

Rule 40.
Preparation
of bond.

By rule 40, "The administration bond is, in all cases of limited or special administrations, to be prepared in the registry."

Rule 41.
Sureties to be
responsible
persons.

By rule 41, "The registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons" (c).

By the Probate Directions of May 10th, 1893, given in lieu of those of November 15th, 1892, it is directed: 1. that "The administration of a foreign subject resident abroad may, (a) if it shall be proved by affidavit that the deceased left no debts in England, (b) by leave of a judge at chambers, be allowed to give a bond with foreign sureties. 2. In all other cases sureties residing in the United Kingdom, the Channel Islands, or the Isle of Man, shall be required, except by leave of a judge at chambers" (d).

(a) But this rule may be dispensed with: *In the goods of Parker*, L. R. 1 P. & D. 301.

(b) As to reducing the penalty of the bond, see *ante*, p. 430, and as to dispensing with sureties, see *ante*, pp. 430, 434. The penalty is now, in cases coming within the Land Transfer Act, 1897, double the gross principal value of the personal estate, plus double the gross annual value of the real estate. *Vide ante*, p. 430, note (g).

(c) A "Guarantee Society" has been accepted by the Court as surety to a bond given by an administrator pending suit, even though the directors do not by bond render themselves personally liable: *Carpenter v. Queen's Proctor*, 7 P. D. 235. See also *In the goods of Hunt*, [1896] P. 288.

(d) See *In the goods of De Beaufort*, [1893] P. 231; *In the goods of Scott*, [1895] P. 342.

BOOK THE SIXTH.

THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION
AS LONG AS THEY ARE UNREVOKED:—OF THE REVOCATION,
OF THEM, AND OF THE CONSEQUENCES THEREOF.

CHAPTER THE FIRST.

THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION
AS LONG AS THEY REMAIN UNREPEALED.

IT is a legal consequence of the exclusive jurisdiction of the Probate Division in deciding on the validity of Wills of personality, and granting administration, that its sentences pronounced in the exercise of such exclusive jurisdiction should be conclusive evidence of the right directly determined (*a*). Hence a probate, even in common form, unrevoked, is conclusive both in the Courts of Law and of Equity (*b*), as to the appointment of executor, and the validity and contents of a Will, so far, as to cases prior to the Land Transfer Act, 1897, as it extends to personal property, and as to Wills coming within the operation of that Act, as to both real and personal property; and the Will cannot be impeached by evidence even of fraud (*c*).

As to what facts probate, &c. is conclusive.

Therefore it is not allowable to prove that another person was appointed executor, or that the testator was insane, or that the

(*a*) 1 Phil. Ev. 343, 7th edit.

(*b*) *Allen v. Dundas*, 3 T. R. 125; *Griffiths v. Hamilton*, 12 Ves. 298; *Jones v. Jones*, 3 Meriv. 171. All the then cases on this subject will be found collected and commented on with great ability in Hargrave's Law Tracts, pp. 459 *et seq.* A probate obtained, as a matter of course, on a Scotch confirmation, under stat. 21 & 22 Vict. c. 56 (see *ante*, p. 264, n. (*m*)), stands on the same footing; and it makes no difference that proceedings are pending in Scotland for a reduction of the confirmation: *Cumming v. Fraser*, 28 Beav. 614.

(*c*) *Griffiths v. Hamilton*, 12 Ves. 307; *ante*, p. 30; *post*, pp. 443, 444.

Will of which the probate has been granted was forged: for that would be directly contrary to the seal of the Court in a matter within its exclusive jurisdiction (*d*).

In short, without the *constat* of the Probate Division, no Court can take notice of the rights of representation to personal property, or to real estate in cases coming within the operation of the Land Transfer Act, 1897; and when that Division has, by the grant of probate or letters of administration, established the right, no other Court can permit it to be gainsayed (*e*). The Court is bound to assume that all documents admitted to probate are testamentary documents (*f*).

Stat. 20 & 21
Vict. c. 77,
s. 75.

By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 75, "After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in, or affected by, such grant of administration, until such administration shall have been recalled or revoked."

A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country, but it proves nothing else (*g*). Therefore the fact that probate of a Will has been granted by an English Court is not conclusive that the testator was domiciled in England, even though the Will is in such form that, though admissible as a testamentary instrument according to the English law, it would not have been entitled to probate, according to the law of the country of the true domicile of the deceased (*h*). And it would seem from the decision of the House of Lords in *Concha v. Concha* (*i*), that even though the facts had been such that the Court in granting probate decided, and necessarily decided, the question of domicile (which was not the case in *Concha v. Concha*), yet the judgment would not have bound everybody as a judgment *in rem*, but would leave open the question of domicile, so far as regards the distribution of the residuary sum of the testator's property after all the creditors, who had a right to come upon it, had been sufficiently paid off.

(*d*) *Noel v. Wells*, 1 Sid. 359.

(*e*) *Att.-Gen. v. Partington*, 3 Hurl. & C. 204; *Re Ivory*, 10 C. D. 372.

(*f*) *In re Barrance*, [1910] 2 Ch. 419, 421; *In re Wernher*, [1918] 1 Ch. 339; [1918] 2 Ch. 82, C. A.

(*g*) *Whicker v. Hume*, 7 H. of L. 124, and *vide supra*, note (*f*).

(*h*) *Bradford v. Young*, 26 C. D. 656; 29 C. D. 617.

(*i*) 11 App. Cas. 541.

So, in *Bouchier v. Taylor* (*j*), it was decided by the House of Lords that after a sentence in the Ecclesiastical Court determining the question who are the next of kin of the intestate, and granting letters of administration to the person found to be such next of kin, the Court of Chancery was precluded from directing any issue to try that question. And this decision was held by Lord Lyndhurst in *Barrs v. Jackson* (*k*) (reversing the decree of Knight Bruce, V.-C.) (*l*), to be a binding authority for the proposition, that if the sentence of the Ecclesiastical Court, in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in the Court of Chancery, between the same parties, for distribution (*m*).

After sentence of Ecclesiastical Court determining who are next of kin no issue could be directed by Court of Chancery to try such question.

Upon this principle it was decided, that payment of money to an executor, who has obtained probate of a forged Will, is a discharge to the debtor of the deceased, notwithstanding the probate be afterwards declared null in the Ecclesiastical Court, and administration be granted to the intestate's next of kin (*n*): for if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor,

Payment to executor who has obtained probate of forged Will is good discharge of debtor.

(*j*) 4 Bro. P. C. 708, Toml. edit. See Hargrave's Law Tracts, pp. 472—476. The case of *Bouchier v. Taylor* was much discussed in the House of Lords in *Concha v. Concha* (*ubi sup.*), and distinguished on the ground, 1st, that the question as to which the residuary legatee under the Will of Alice Merchant was held bound by reason of the decision against his predecessor in title, was the very point which had to be decided by the Spiritual Court in the litigation between Dr. Bouchier and the executors of Alice Merchant: and 2ndly, that at that time the Spiritual Court was a Court of distribution as well as a Court merely to determine the question of the validity of the testament, and to grant probate or administration.

(*k*) 1 Phil. C. C. 582. And see *Spencer v. Williams*, L. R. 2 P. & D. 230.

(*l*) 1 Y. & Coll. C. C. 585.

(*m*) So long as letters of administration remain in force they are conclusive evidence that the administrator to whom as next of kin, or one of the next of kin, they were granted, is in fact such next of kin: *Re Ivory*, 10 C. D. 372, *per* Lush, J., 374. In *Long v. Wakeling*, 1 Beav. 400, where A. B., being entitled to a fund in Court, died, and administration was granted to a person, as "the natural and lawful sister" of A. B.; and it appeared from the proceedings in the cause, that A. B. was illegitimate, the Court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of Court without notice to the Crown.

(*n*) *Allen v. Dundas*, 3 T. R. 125. See also *Prosser v. Wagner*, 1 C. B. N. S. 289, and the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 77, *post*, p. 468.

as long as the probate was unrepealed: and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it (*o*).

When there is a question, whether particular legacies given by a Will are cumulative or substituted, it is often determined by the circumstance of the bequest having been given by distinct instruments (*p*). In such a case, if the probate has been granted, *as of a Will and codicil*, this is conclusive of the fact of their being distinct instruments, though written on the same paper (*q*).

Probate conclusive as to every part of Will.

The probate is also conclusive as to every part of the Will in respect of which it has been granted: for example, in *Plume v. Beale* (*r*), where an executor proved a Will of personal property, and then brought a bill in equity to be relieved against a particular legacy, on the ground of its having been interlined in the Will by forgery, Lord Cowper dismissed the bill with costs, observing, that the executor might have proved the Will in the Ecclesiastical Court, with a particular reservation as to that legacy (*s*).

In what cases a Court of Equity will interfere.

But though Courts of Equity were bound to receive, as testamentary, a Will, in all its parts, which had been proved in the proper Spiritual Court, yet Courts of Equity, in certain cases, affect with a trust a particular legacy or a residuary bequest, which has been obtained by fraud (*t*). For instance, if the drawer of a Will should fraudulently insert his own name, instead of that of a legatee, he would be considered in equity as a trustee for the real legatee (*u*). And it has never been

(*o*) *Allen v. Dundas*, 3 T. R. 129. Where, however, a sum of stock was standing in the name of a testatrix, which her executors overlooked, and, the dividends remaining unclaimed, the stock was transferred to the National Commissioners; and afterwards one Sanders procured a probate, in the name of T. Hunt, of a forged Will of the testatrix, and obtained a transfer; it was held by Lord Langdale, M. R., that the probate did not authorize a payment to Sanders, and that a party giving faith to the probate was bound to see that the person claiming under it was a real T. Hunt: *Ex parte Jolliffe*, 8 Beav. 168.

(*p*) See *infra*, Pt. III. Bk. III. Ch. II. § VII.

(*q*) *Baillie v. Butterfield*, 1 Cox, 392.

(*r*) 1 P. Wms. 388.

(*s*) See *ante*, p. 290.

(*t*) Mitf. Pl. 257, 4th edit.

(*u*) *Marriot v. Marriot*, 1 Stra. 666; Mitf. Pl. 258, 4th edit. See *post*, p. 445, note (*f*). So in *Segrave v. Kirwan*, 1 Beat. 157, the executor, who was a barrister, had himself prepared the Will, the rule of law at the time being that the executor was entitled to the residue unless otherwise disposed of, or unless a legacy was bequeathed to him

thought that Courts of Equity, by declaring a trust, in such cases, infringed upon the jurisdiction of the Ecclesiastical Courts (x).

Again, although it is now settled that a Will cannot, either before or after probate, be set aside in equity, on the ground that the Will was obtained by *fraud on the testator*, yet where probate has been obtained by *fraud on the next of kin*, equity interferes and either converts the wrongdoer into a trustee, in respect of such probate, or obliges him to consent to a repeal or revocation of it in the Court in which it was granted (y).

The subject was much discussed in the case of *Allen v. McPherson* (z). There the testator had by his Will and subsequent codicils bequeathed considerable property to the plaintiff, and made also other bequests to other relatives: he

(see *post*, Pt. III. Bk. III. Ch. v. § II.); and Sir A. Hart held that it was the duty of the executor to have informed the testator that such was the rule, and that he could not be allowed to profit from this omission, but must be decreed to be a trustee for the next of kin. See also *Bulkeley v. Wilford*, 2 Cl. & F. 102; S. C., 8 Bligh, 111. It was held by Sir J. Stuart, V.-C. (notwithstanding the case of *Allen v. McPherson*, *infra*, note (z)), that the Court, under its equitable jurisdiction, has authority to declare an attorney a trustee for the heir-at-law and next of kin of real and personal estate given him by a Will prepared by himself, where he has improperly taken advantage of the testator's ignorance, or allowed him to remain under a mistaken impression which influenced the gift: *Hindson v. Weatherill*, 1 Sm. & G. 609. But this decision was reversed on appeal, on the facts, the Lords Justices declining to give any opinion on the law of the case: Lord Justice Turner, however, distinguished it from *Segrave v. Kirwan*, observing that in that case the testator had no intention to benefit Kirwan the counsel: 5 De G. M. & G. 301. See also *Walker v. Smith*, 29 Beav. 394.

(x) 1 Stra. 673; Gilb. Eq. Rep. 209; Fonbl. Eq. Bk. 4, Pt. 2, c. 1, s. 1, n. (a).

(y) *Barnesly v. Powell*, 1 Ves. Sen. 119, 284, 287. The distinction between a fraud on the testator in obtaining the Will and a fraud on the next of kin in obtaining probate, taken by Lord Hardwicke in *Barnesly v. Powell*, was recognized by Lord Apsley in *Meadows v. Duchess of Kingston*, Ambl. 764, and by Lord Cottenham in *Price v. Dewhurst*, 4 M. & Cr. 76, 85. See also *Gingell v. Horne*, 9 Sim. 539; Mitf. Pl. 357, 4th edit.; 2 Roper Leg. 688, 3rd edit. In *Priestman v. Thomas*, 9 P. D. 210, in an action in the Probate Division, T. and G. propounded an earlier and P. a later Will. The action was compromised, and by consent verdict and judgment were taken for establishing the earlier Will. Subsequently P. discovered that the earlier Will was a forgery, and in action in the Chancery Division to which T. and G. were parties obtained the verdict of a jury to that effect and judgment that the compromise should be set aside. In another action in the Probate Division for revocation of the probate of the earlier Will it was held, affirming the decision of the President of the Probate Division (9 P. D. 70), that T. and G. were estopped from denying the forgery.

(z) 5 Beav. 469; 1 Phil. C. C. 133; 1 H. of L. 191.

afterwards, by a further codicil, revoked these bequests, and in lieu of them made a small pecuniary provision for the plaintiff: The bill alleged that this codicil was obtained by false and fraudulent representations, made by an illegitimate son of the testator, acting in confederacy with the defendant, his daughter and residuary legatee, as to the character and conduct of the plaintiff: In the Ecclesiastical Court, the plaintiff had unsuccessfully resisted the admission to probate of the revoking codicil, on the ground that it had been obtained by undue influence: And the bill further stated that the appellant was confined in that Court to grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill or into any other case solely relating to the parts of the codicil which affected only the appellant: To this bill the defendant demurred: Lord Langdale, M. R., overruled the demurrer, being of opinion that, by analogy to former decisions, as the bill alleged that the revocation had been procured by the fraud of the defendant, the Court of Chancery had jurisdiction to deprive her of the benefit of it, and to declare her to be a trustee of that to which the law entitled her for the benefit of the person to whose prejudice the fraud was practised (a). But this decision was reversed by Lord Lyndhurst, C., on appeal, and his Lordship relied on the distinction taken by Lord Hardwicke (as above stated), in *Barnesly v. Powell* (b), and recognized by Lord Apsley in *Meadows v. The Duchess of Kingston* (c), between fraud on the testator and fraud upon the person disinherited thereby: His Lordship further relied on *Kerrich v. Bransby* (d), as a decision of the House of Lords establishing not merely that a Will cannot be set aside in equity for fraud (e), but further, that the

(a) 5 Beav. 469.

(b) *Ante*, p. 443, note (y).

(c) Ambl. 762, *ante*, p. 435, note (y).

(d) 7 Bro. P. C. 437.

(e) But Lord Abinger, C. B., in his judgment in *Middleton v. Sherburne*, 4 Y. & Coll. Exch. C. 358, argued with much pains that in *Kerrich v. Bransby*, the bill was dismissed on the merits, and that the case is, therefore, no authority for the proposition that a Will cannot be set aside in equity for fraud. That, however (observed Lord Lyndhurst, in *Allen v. McPherson*, 1 Phil. C. C. 146), has not been the understanding of the profession, and Lord Hardwicke, who probably was acquainted with the history of the case, expressly states in *Barnesly v. Powell*, that it was decided on the question of jurisdiction. And Lord Eldon, in *Ex parte Fearon*, 5 Ves. 633, 647, observed that it was determined in *Kerrich v. Bransby* that the Court of Chancery could not take any cognizance of Wills of personal estate as to matter of fraud.

Court of Chancery has no jurisdiction to declare the fraudulent legatee a trustee for the party defrauded. And this decision was afterwards affirmed on appeal to the House of Lords; their Lordships holding that the Ecclesiastical Court had jurisdiction to refuse and ought to have refused probate of that part of the codicil which affected the appellant, because giving credit to the facts stated by the bill, and admitted by the demurrer, that part of the codicil was not the Will of the testator, having been obtained by a fraud practised on him; but that the proper course would have been to appeal to the Privy Council in order to set the matter right, and not to file a bill in equity, which was, in effect, an attempt to review the decision of a Court of Probate by the Court of Chancery (f).

Further, the Court of Construction may, under particular circumstances, so construe an instrument, of which probate has been obtained, as to render it ineffectual. Thus in *Gawler v. Standerwick* (g), a paper was proved in the Spiritual Court as a codicil of the testator, which was signed by the executors and others, and purported to be an acknowledgment of what *they understood* to be the Will of the testator, when he was unable to speak, in favour of certain legatees; and a bill having been filed in equity, a question was raised whether they were entitled to their legacies under this paper proved as a codicil: Sir Lloyd Kenyon, Master of the Rolls, said that, as it had been proved in the Spiritual Court, he was bound to receive it as a testamentary paper; but having so done, *the Court of Equity was to construe it*: Now the effect of this codicil was only that the parties *understood* it to be the Will of the testator that the asserted legatees should have legacies, and the heir promised to perform this; but the Court could not convert the promise

(f) 1 H. of L. 191. Lords Lyndhurst, Brougham, and Campbell were of opinion that the decree should be affirmed, *dissentientibus* Lords Cottenham, C., and Langdale, M. R. Lord Lyndhurst, in the course of delivering his opinion, observed as to the case mentioned by Gilbert, C. B., in *Marriot v. Marriot* (*ante*, p. 442, n. (u)), of the drawer of the Will fraudulently inserting his own name instead of that of the legatee, that if probate were refused in such a case, on account of the fraud, the real legatee would lose his legacy. And his Lordship added, that he thought it would be found, on examining the cases in which the House of Lords had declared a legatee or executor to be a trustee for other persons, that they have been either questions of construction, or cases in which the party had been named as trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. See also *Melhuish v. Milton*, 3 C. D. 27.

(g) 2 Cox, 16.

of the heir into the Will of the testator; and his Honour, therefore, thought that this paper, though testamentary, yet operated nothing.

Again, in *Walsh v. Gladstone* (*h*), the testator had drawn two cheques on his banker in favour of two of his servants, with a direction that the cheques should be presented after his death: About a year afterwards he made a formal Will, in which, among other bequests, he gave an annuity to each of the two servants, and the residue of his personal estate to certain other persons, and revoked all former Wills: After his death all the three instruments were admitted to probate as constituting, together, his last Will: and it was held by Shadwell, V.-C., that, although he was bound by the decision of the Ecclesiastical Court, to consider the two cheques as part of the Will, yet that nothing which that Court had done in the way of construction would bind the Court of Chancery; and his Honour proceeded to state that his opinion, sitting in the Court of Construction, was that the bequests made by the cheques were revoked by the Will; and he decreed accordingly. This decision was afterwards affirmed by Lord Lyndhurst, C. (*i*), who considered the question as one of construction, which it was within the competence of the Court of Chancery to determine, notwithstanding the probate granted by the Ecclesiastical Court: And his Lordship relied on the case above stated, of *Gawler v. Standerwick*, and also that of *Campbell v. Lord Radnor* (*k*), in which it was declared that the first codicil, which had been admitted to probate, was to be considered as virtually revoked by the second (*l*).

Accordingly in *Thornton v. Curling* (*m*), Lord Eldon, C., expressed his opinion that if a British subject domiciled in a foreign country, by his Will appoints an executor, but makes a disposition of his personal property, which, though valid by the laws of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, notwithstanding probate may have been granted in this country, to hold that the Will has no operation beyond appointing the executor: And his Lordship observed that although, as the Ecclesiastical Court had granted probate of the Will, he must take it to be a Will,

(*h*) 13 Sim. 261.

(*i*) 1 Phil. C. C. 294.

(*k*) 1 Bro. C. C. 171.

(*l*) See *post*, Pt. III. Bk. III. Ch. II. § VII.

(*m*) 8 Sim. 310.

yet what part of the contents of that Will was effectual, and in what way the Court should determine on the property, was quite a different thing (*n*).

So in *Campbell v. Beaufoy* (*o*), a plea by an executor who has proved a Will, that "the testator was at the date of his Will, and also at the time of his death, domiciled in France, and that all the bequests of the personal estate affected to be made by it are by the law of France null and void," was held by Wood, V.-C., to be a good plea in bar to a suit by a legatee under the Will for payment of his legacy and for administration of the personal estate of the testator.

So in *Loffus v. Maw* (*p*), which there has already been occasion to state, a revoking codicil, though it had been admitted to probate, was not allowed under the circumstances to have any revoking effect (*q*).

Under the law before the passing of the Court of Probate Act, 1857, the jurisdiction of the Ecclesiastical Court was confined to personal property; it had no power of administration over other property; and therefore its judgments would bind those only who claimed an interest in personal property. Hence the probate was not conclusive evidence, or even, it would seem, admissible evidence, that the instrument was a Will, so as to pass copyhold or customary estate, or so as to operate as a sufficient execution of a power to charge land (*r*).

Cases where probate, &c. is not conclusive:

Again, it has already appeared (*s*), that to establish in evidence the Will of a married woman made in execution of a power, probate of it in the Court of Probate is first necessary, in order to confirm judicially its testamentary nature. Formerly, however, the production of such a probate would not alone have been sufficient to induce a Court of Equity to act upon it; for there were other special circumstances which might have been required to give the instrument effect as a valid appointment, viz., attestation, sealing, &c., with which circumstances the Temporal Courts did not trust the judgment of the Spiritual Court. The witnesses, therefore, to these facts, must have been

to establish valid execution of a power.

(*n*) See *Concha v. Concha*, 11 App. Cas. 541; *Bradford v. Young*, 29 C. D. 617.

(*o*) Johns. 320.

(*p*) 3 Giff. 592.

(*q*) But see *ante*, p. 93, note (*o*).

(*r*) *Hume v. Rundell*, 6 Madd. & Geld. 331. See now, however, sects. 62 and 64 of the Probate Act, 1857, *post*, pp. 450, 451. See also the Land Transfer Act, 1897, s. 1, *post*, p. 452.

(*s*) *Ante*, pp. 44, 301, 302.

Stat. 1 Vict.
c. 26, s. 10:

examined in chief to prove that the Will was the wife's act, &c.; and if an attestation were not required by the power, still her signature must have been proved (*t*). But by the 10th section of the Wills Act, 1837, all such additional varieties in the execution of testamentary appointments have, in effect, been abolished.

to authenti-
cate a Will of
real estate:

Further, as the Court of Probate had no jurisdiction to authenticate a Will, as far as it related to real estate, it was held that the probate was no evidence at all of the validity or contents of a Will as to such property (*u*), not even when the original Will was lost (*x*), except indeed as a mere copy.

on an indict-
ment for
forging a
Will:

So on an indictment for forging a Will, probate of that Will unrepealed is not conclusive evidence of its validity so as to be a bar to the prosecution (*y*).

of any col-
lateral matter
which may
be inferred,
e.g. death.

It must also be observed, that although the sentences of the Court of Probate are conclusive evidence of the right directly determined, yet they are not so of any collateral matter, which may possibly be collected or inferred from the sentence by argument (*z*). Therefore letters of administration which have been granted to a person as administrator of the effects of A. B., deceased, are not *primâ facie* evidence of A. B.'s death (*a*).

Likewise, though no evidence was receivable to impeach the probate or the letters of administration, being the judicial acts of a Court having competent authority, yet it might be proved that the Court which granted them had no jurisdiction, and that therefore their proceedings were a nullity (*b*). So it may be

(*t*) *Rich v. Cockell*, 9 Ves. 376. See also *Morgan v. Annis*, 3 De G. & Sm. 461, where Knight Bruce, V.-C., said he had no doubt the Court of Chancery had jurisdiction to decide on the validity of the execution of a testamentary power over personalty, with reference to the donee's state of mind at the time of the alleged execution.

(*u*) Bull. N. P. 245.

(*x*) *Doe v. Calvert*, 2 Campb. 389.

(*y*) *Rex v. Buttery*, Russ. & Ry. C. C. R. 342. It is said in *Rex v. Vincent*, 1 Stra. 481, that the probate was admitted as conclusive evidence on a similar prosecution: but that case must now be considered as overruled. See *Rex v. Gibson*, Russ. & Ry. C. C. R., at p. 343, note (*a*).

(*z*) *Blackham's Case*, 1 Salk. 290.

(*a*) *Thompson v. Donaldson*, 3 Esp. N. P. C. 63; *Moons v. De Bernales*, 1 Russ. Chan. Cas. 301 (but see *French v. French*, Dick. 268, where Lord Hardwicke, under particular circumstances, admitted the probate as proof of the testator's death). However, if the plaintiff sues an executor or administrator, and there is no plea of *ne unques executor* or *administrator*, the plaintiff's right to sue is admitted, and therefore no evidence can be required of the death of the testator or intestate: *Lloyd v. Finlayson*, 2 Esp. 564.

(*b*) *Allen v. Dundas*, 3 T. R. 130.

proved that the supposed testator or intestate is alive: for in such case the Court of Probate can have no jurisdiction, nor their sentence any effect (c). And it may be shown that the seal attached to the supposed probate has been forged; for that does not impeach the judgment of the Court of Probate (d): or that the letters testamentary have been revoked; for this is in affirmance of its proceedings (e).

Very material alterations of some of the doctrines above stated were introduced by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

By sect. 61 of that statute, "Where proceedings are taken under this Act for proving a Will in solemn form, or for revoking a probate of a Will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a Will is disputed, unless in the several cases aforesaid the Will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the Will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others having or pretending interest in the personal estate affected by a Will, should be cited or summoned and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court" (f).

Alterations in the law as to the effect of probate as to real estate. Stat. 20 & 21 Vict. c. 77, s. 61. Where a Will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

(c) *Allen v. Dundas*, 3 T. R. 130.

(d) *Marriot v. Marriot*, 1 Stra. 671.

(e) Bull. N. P. 247.

(f) The affidavit on which an application to cite the persons interested in the real estate affected by a Will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England and at a date since the Wills Act came into operation: *Campbell v. Lucy*, L. R. 2 P. & D. 209. Where, in a suit commenced by caveat, the party propounding a Will wishes to cite the heir-at-law under this section, before pleas have been filed contesting the validity of the Will, he must make an affidavit that he intends to proceed and prove the Will in solemn form: *Peacock v. Lowe*, L. R. 1 P. & D. 311, commented on in *Moran v. Place*, [1896] P. 214. In an action as to the validity of a Will the Court refused to order the assignee of the heir-at-law of the testatrix to be cited as a person having or pretending interest in the real estate affected by the Will: *Jones v. Jones*, 7 P. D. 66. The provisions of the above section are not altered by the Judicature Acts and the rules therein contained; therefore, in order that a decree in a testamentary suit may bind the heir-at-law or devisee of real estate, a citation should be

Sect. 62.

Where the Will is proved in solemn form, or its validity otherwise decided on, the decree of the Court to be binding on the persons interested in the real estate.

And by sect. 62, "Where probate of such Will is granted, "after such proof in solemn form, or where the validity of the "Will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or "order respectively shall enure for the benefit of all persons "interested in the real estate affected by such Will, and the "probate copy of such Will, or the letters of administration "with such Will annexed, or a copy thereof, respectively, "stamped with the seal of her Majesty's Court of Probate, "shall in all Courts, and in all suits and proceedings affecting "real estate of whatever tenure (save proceedings by way of "appeal under this Act, or for the revocation of such probate "or administration), be received as conclusive evidence of the "validity and contents of such Will, in like manner as a probate "is received in evidence in matters relating to the personal "estate; and where probate is refused or revoked on the ground "of the invalidity of the Will, or the invalidity of the Will is "otherwise declared by decree or order under this Act, such "decree or order shall enure for the benefit of the heir-at-law "or other persons against whose interest in real estate such "Will might operate, and such Will shall not be received in "evidence in any suit or proceeding in relation to real estate, "save in any proceeding by way of appeal from such decrees or "orders" (g).

Sect. 63.

Heir in certain cases not to be cited and where not cited not to be affected by probate.

And by sect. 63, "Nothing herein contained shall make it "necessary to cite the heir-at-law or other persons having or "pretending interest in the real estate of a deceased person, "unless it is shown to the Court and the Court is satisfied that "the deceased was, at the time of his decease, seised of or "entitled to or had power to appoint by Will some real estate "beneficially, or in any case where the Will propounded, or of "which the validity is in question, would not in the opinion of "the Court, though established as to personalty, affect real "estate; but in every such case, and in any other case in which "the Court may, with reference to the circumstances of the

taken out against them under the provisions of the above section, notwithstanding the directions of R. S. C. 1883, Ord. xvi. r. 11, R. S. C. 1875, Ord. xvi. r. 13: *Kennaway v. Kennaway*, 1 P. D. 148.

(g) This section, as likewise the 61st, *ante*, p. 449, and sects. 63 and 64, *infra*, are not applicable to Wills executed before the Wills Act, or which in whole or in part have been executed not in accordance with the requirements of the Wills Act: *Campbell v. Lucy*, L. R. 2 P. & D. 209.

“property of the deceased or otherwise, think fit, the Court may
 “proceed without citing the heir or other persons interested in
 “the real estate: provided, that the probate, decree or order of
 “the Court shall not in any case affect the heir or any person
 “in respect of his interest in real estate, unless such heir or
 “person has been cited or made party to the proceedings, or
 “derives title under or through a person so cited or made
 “party” (h).

And by sect. 64, “In any action at law or suit in equity,
 “where, according to the existing law, it would be necessary to
 “produce and prove an original Will in order to establish a
 “devise or other testamentary disposition of or affecting real
 “estate, it shall be lawful for the party intending to establish
 “in proof such devise or other testamentary disposition, to give
 “to the opposite party, ten days, at least, before the trial or
 “other proceeding in which the said proof shall be intended to
 “be adduced, notice that he intends at the said trial or other
 “proceeding to give in evidence, as proof of the devise or other
 “testamentary disposition, the probate of the said Will or the
 “letters of administration with the Will annexed, or a copy
 “thereof, stamped with any seal of the Court of Probate; and
 “in every such case such probate or letters of administration, or
 “copy thereof respectively, stamped as aforesaid, shall be suffi-
 “cient evidence of such Will and of its validity and contents,
 “notwithstanding the same may not have been proved in solemn
 “form, or have been otherwise declared valid in a contentious
 “cause or matter, as herein provided, unless the party receiving
 “such notice shall, within four days after such receipt, give
 “notice that he disputes the validity of such devise or other
 “testamentary disposition” (i).

It will be observed, that unless the Will has been proved in

(h) See *ante*, p. 245, and the Rule 78 (Contentious) there stated, as to obtaining the requisite order authorizing the citation of the heir, &c. See also the cases cited, *ibid.*, note (t), as to the construction of the rule.

(i) The true meaning of this provision appears to be that when a notice has been given of the intention to use the probate in evidence, and the other side do not give a counter notice within four days, the probate, without more, will be admissible evidence of a Will and its contents as to realty, and will be *prima facie* evidence of the validity of the Will and the competence of the testator: in other words the probate alone will be sufficient evidence to go to the jury of a devise of realty, but there is nothing to prevent the other side from showing by evidence that the Will is not valid, or that the testator was not competent: *Barracough v. Greenhough*, L. R. 2 Q. B. 612.

Sect. 64.

Probate or office copy to be evidence of the Will in suits concerning real estate, save where the validity of the Will is put in issue.

solemn form and its validity declared by decree or order, so as to fall within the 62nd section, it will still be necessary in cases not coming within the operation of the Land Transfer Act, 1897, to produce the original Will, if notice of disputing the validity be given under the 64th section. But such notice may be given at the peril of having to pay the costs of the production and proof of the Will (*j*).

Effect of Land
Transfer Act,
1897 (60 & 61
Vict. c. 65).

In the case of deaths on or since the 1st January, 1898, as the result of the provisions of sect. 2 (2) of the Land Transfer Act, 1897 (*jj*), probate is conclusive evidence in respect of real estate to which the Land Transfer Act, 1897, applies (*k*), of the *factum* and validity of the Will, and letters of administration are conclusive evidence of the intestacy of the deceased. The title of the heir-at-law or devisee is established by the production of the grant, coupled with evidence of the death of the testator or intestate, and of the assent of or conveyance by the personal representative. Moreover, since the Land Transfer Act, 1897, the heir-at-law and persons interested in the real estate are on the same footing as the next of kin in respect of their right and liability to be made parties to an action, and if cited to see proceedings in probate and administration suits where their interests can be affected by the decree, are subject to the same rules as govern citations to see proceedings against parties interested in the personal estate. No order from or leave of the judge is now required before the issue of such citations (*l*).

How far the
original Will
may be re-
ferred to, in
order to cor-
rect inaccura-
cies in the
probate.

In *L'Fit v. L'Batt* (*m*), there was a French Will, an English translation of which was proved, and a copy of the Will in French deposited, but the Will appeared to be falsely translated; upon which it was objected, that the translation being part of the probate, and allowed in the Spiritual Court, it must

(*j*) The absence of notice may, it would seem, be waived, or the Court may adjourn the case to allow of the notice being given, or to allow proof of the Will *per testes*: *Hilliard v. Eiffe*, L. R. 7 H. L. 39—49.

(*jj*) Set out *post*, Pt. IV. Bk. I.

(*k*) The Land Transfer Act, 1897, does not apply to land of copyhold tenure or customary freehold (sect. 1 (4)). As regards real property of this description, the former rules still apply.

(*l*) See Probate Rule No. 109 of 20th November, 1897; Mortimer on Probate, pp. 531, 532; and see *Twist v. Tye*, [1902] P. at p. 98.

(*m*) 1 P. Wms. 526. It seems from *Re Cliffe's Trusts*, [1892] 2 Ch. 229 (in which case the report of *L'Fit v. L'Batt* is corrected), that the Court of Construction will look at the foreign original even where an English translation only is proved, if none of the parties insist upon an application being made to the Probate Division to correct the English translation.

bind: and the application must be to the Spiritual Court to correct the mistakes in the translation, which until then must be conclusive: but, *by the Master of the Rolls* (n), nothing but the original is part of the probate, neither hath the Spiritual Court power to make any translation: and supposing the original Will was in Latin (as was formerly very usual) and there should happen to be a plain mistake in the translation of the Latin into English, surely the Court might determine according to what the translation ought to be: And so it was done in that case.

In *Havergal v. Harrison* (o), where the words in the probate were "brother and sister," and it was suggested that in the original Will the words were "brothers and sister," Lord Langdale, M. R., said, he was bound by the probate, but if, on the production of the original Will, a doubt existed as to the accuracy of the probate copy, the Court would give an opportunity to the parties to apply to the Ecclesiastical Court to set it right. Accordingly, in *Oppenheim v. Henry* (p), *coram* Wood, V.-C., where the probate copy of a Will was in these words: "I release my sons from all claims due to me by bonds *on* moneys advanced to them by me," and his Honour was desired to look at the original Will, in order to ascertain whether the word written "*on*" in the probate was not "*or*" in the Will, the learned judge declined to do so, and said that looking at the Will to ascertain the alleged inaccuracy of the probate was quite different from the case of a question arising on the punctuation of the Will, or on the introduction of a capital letter, or other mark indicating where a sentence was intended to begin, and which might affect its sense. So also in *Gann v. Gregory* (q), *coram* Lord Cranworth, C., where the Ecclesiastical Court had granted a *fac-simile* probate of a Will, made after the Wills Act came into operation, with cross lines drawn in ink over the bequests of certain legacies (the decree in the Prerogative Court having been pronounced for the Will as contained in the document, "with the several alterations, interlineations, and erasures, appearing therein"); and it was suggested to his Lordship, that if the original Will were looked at, it would be seen that the pencil alterations made in the legacies contained under the cross lines must have been made after those

(n) Sir Joseph Jekyll.

(o) 7 Beav. 49.

(p) 9 Hare, 802, note (b) to *Walker v. Tippin* (1853), 1 W. R. 126.

(q) (1854), 3 De G. M. & G. 777.

lines were drawn, and it might thence be inferred that the testator meant the legacies to remain part of the Will; his Lordship said that he was not of those who thought it was competent for the Court of Chancery on every occasion to look at the original Will, though he was aware Lord Eldon did it in some instances, but in each there were particular circumstances: And his Lordship proceeded to express his opinion, that as probate had been granted of the Will, with the alterations in it, it must be taken as conclusively settled by the Ecclesiastical Court that the Will was at its execution in its present state; that is, that the testator executed the instrument with the lines drawn over it, meaning thereby, that the legacies were not to stand part of the Will. Again, in *Taylor v. Richardson* (r), *coram* Kindersley, V.-C., where the probate had been delivered out with blanks in the course of the Will, and it was suggested that it might be construed as if the words ran continuously, his Honour observed, that the Ecclesiastical Court said that the Will was an instrument in such and such words, and in certain places, such and such blanks, and that the Court of Chancery was bound to look at them as part of the Will. The Court will, however, look at the Will itself in order to derive aid in its construction from the punctuation, or manner of writing, or from other appearances on the face of it. In *Compton v. Bloxham* (s), *coram* Knight Bruce, V.-C., his Honour relied, in construing a Will, on the circumstance that certain words began an entirely new sentence; and he begged to have it observed, that although it was a Will of personalty, he had sent for and examined the original Will, and had been influenced by it in his construction. Again, in *Shea v. Boschetti* (t), where a *fac-simile* probate of a Will, with certain passages of it struck through, had been granted, Sir J. Romilly, M. R., expressed his opinion that, whether the Court of Probate grants a *fac-simile* probate or not, the Court of Chancery is bound to look at anything in the original Will itself which may aid and assist it in coming to a correct conclusion as to the construction to be put upon the contents of the Will. So in *Manning v. Purcell* (u), it appears that the Lords Justices in construing a Will of personalty, ordered the original Will to be produced, and had regard to certain erasures appearing therein, but which had been

(r) 2 Drewr. 16.
(t) 18 Beav. 321.

(s) 2 Coll. 201.
(u) 7 De G. M. & G. 55.

omitted in the probate, notwithstanding that counsel objected that the probate copy could alone be looked at. And in the case of *Re Harrison (v)*, where a testatrix in making her Will used a law stationer's form, which was partly in print, blanks being left in it, which were to be filled up by the person who made use of it, and after directing that her debts and funeral and testamentary expenses should be paid by her executrix thereinafter named gave all her property both real and personal "unto to and for her own use and benefit absolutely, "and I nominate, constitute, and appoint my niece Catherine "Hellard to be executrix of this my last Will and testament." The Court of Appeal held that there was an effectual gift of the residue to Catherine Hellard, and that for the purpose of construing a Will the Court is entitled to look at the original Will, as well as at the probate copy. In his judgment, Lord Esher, M. R., says, "The main argument in this case is founded "on there being a blank in the Will, and how can you tell that "there is a blank without looking at the Will? I know of no "rule that for the purpose of construing a Will you may not "look at the original Will itself." In this judgment Baggallay, L. J., concurred, who said, "I fully agree that, for many, "purposes, the first thing to be looked at is the probate copy of "the Will. But when I look at the probate copy in this case, "I find that there is a blank space in it. This is consistent "either with an accidental omission to fill up the blank or with "an intention not to fill it up. Then it becomes material to "look at the original Will."

In the earlier editions of this Work Sir Edward Vaughan Williams wrote as follows:—"On the whole, it may, perhaps, "be doubted whether, in strictness, the Court of Chancery has "not gone beyond its legitimate means for construing Wills of "personalty even in the instances above mentioned, where it has "sought aid from appearances in the Will itself not to be found "in the probate, and whether the more proper course is not to "apply to the Probate Court for a corrected *fac-simile* probate, "if it be desired to rely on stops or capital letters, or any "marks which, in truth, are apparent in the Will, though not "in the probate. For until the Court of Probate has sanctioned "them as legal parts of the Will, *non constat*, that they have

(v) 30 C. D. 390. See also *Reeves v. Reeves*, [1909] 2 Ir. R. 521, 533.

“not been introduced by a stranger, or by the testator himself
“after the Will was executed, or otherwise, so as not properly
“to form a part of it: And this can only be decided in the
“Ecclesiastical Court, which is bound to exclude from its probate, whether a *fac-simile* probate or not, all such appearances
“on the face of the Will as do not legitimately belong to it as
“a testamentary instrument.” But the practice would seem to be to look at the original in such cases. The principle to be derived from the cases would appear to be that the original Will may be looked at to assist the construction, but not to alter or vary or displace anything determined in the granting of the probate; and that if it is sought to do this, application must be made to the Probate Division to rectify the probate (x).

(x) See *Re Harrison*, 30 C. D. 390, *ante*, p. 455.

CHAPTER THE SECOND.

OF THE REVOCATION OF PROBATE AND LETTERS OF
ADMINISTRATION.

BY the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 75, Court of Probate Act, 1857, s. 75.
 "After any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act (a) as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked."

After grant of administration no one to have power to sue as executor until the grant is recalled or revoked.

A probate or a grant of letters of administration may be revoked in two ways: 1. On a suit by citation. 2. On an appeal to a higher tribunal to reverse the sentence by which they are granted.

A revocation by citation usually is, when the executor or administrator is cited before the Judge by whom the probate or letters of administration were originally granted, to bring in the same, and to show cause why they should not be revoked (b).

Revocation upon citation.

Appeals under the old law were effected by demanding letters missive, called *Apostoli*, from the Judge *a quo*, to the Judge *ad quem* (c), and the manner and form of appeals were regulated by several statutes.

Revocation on appeal: Manner and form of appeals, stat. 24 H. 8.

(a) When administration has been granted, and another person intermeddles with the goods, this shall not make him executor *de son tort*, by construction of law: *ante*, pp. 180, 181.

(b) It was said in the judgment both of Sir James Hannen and Cotton, L. J., in the case of *Priestman v. Thomas*, 9 P. D. 70, 210, that the Chancery Division has no jurisdiction to revoke a Will, but that the exclusive jurisdiction so to do is vested in the Probate Division. Although, it is submitted, this proposition is too wide, inasmuch as all Divisions have since the Judicature Act, 1873, s. 3, equal and concurrent jurisdiction in matters testamentary, still the question does not appear to be of great practical importance, inasmuch as in the event of a person commencing proceedings for revocation in any Division but the Probate Division, such proceedings would, upon application to the judge, be transferred into the Probate Division, as the Division which can more conveniently and appropriately deal with such matters. See *Pinney v. Hunt*, 6 C. D. 98, and *Bradford v. Young*, 26 C. D. 656.

(c) *Gibs. Cod.* 1035.

Stat. 25 H. 8.
c. 19. Appeal
to the dele-
gates.

As to the law and practice of appeals and commissions of review under the old law see the earlier Editions of this Work; as to the manner and form of such appeals see the statute 24 Hen. VIII. c. 12, and as to appeals to the delegates see the statute 25 Hen. VIII. c. 19.

Stat. 3 & 4
W. 4, c. 92.

Appeal to
Judicial
Committee.

Court of
Probate Act,
s. 39.

Appeal from
the Court of
Probate to
the House of
Lords.

By Judicature
Acts appeal
from Probate
Division to
Court of
Appeal.

By stat. 3 & 4 Will. IV. c. 92, the statute of 25 Hen. VIII. was repealed, and the power of the Court of Delegates was transferred to the Judicial Committee of the Privy Council.

And by the 39th section of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), the appellate jurisdiction in matters and causes testamentary was transferred from the Privy Council to the House of Lords. This section was repealed by the Statute Law Revision Act, 1892.

Now that by the Judicature Acts the jurisdiction of the Court of Probate has been transferred to the Probate Division of the High Court of Justice, the appeal from that Division is to the Court of Appeal as constituted by those Acts (*d*).

The time within which an appeal must be brought is fourteen days from an interlocutory order, or from any order whether final or interlocutory in any matter not being an action, and six weeks for any other appeal, unless the time be enlarged by the Court of Appeal or by the Court or a Judge (*e*).

The notice of appeal must, in the case of a judgment final or interlocutory, or of a final order, be a fourteen days' notice, and in the case of an interlocutory order, a four days' notice (*f*).

Second grant
of adminis-
tration or
probate with-
out revoking
the first.

Some authorities maintain that if the Ordinary committed administration to the wrong party, and then committed it to the right, the second grant was a repeal of the first, without any sentence of revocation (*g*); but in other cases, it has been held, that the first is not avoided except by judicial sentence (*h*).

(*d*) See Judicature Act, 1873, s. 19. When a cause in the Probate Division had been heard before a judge without a jury, the evidence being given *viva voce*, the parties might, if they pleased, apply for a re-hearing under rule 60 of the Probate Rules, July, 1862 (Contentious Business), or they might appeal from the decision of the judge, on the facts as well as the law, to the Court of Appeal. *Sugden v. Lord St. Leonards*, 1 P. D. 154. And see *In re Clook*, 15 P. D. 132. Applications for a new trial or to set aside a verdict, finding or judgment where there has been a trial with or without a jury, are now made to the Court of Appeal. See Ord. 39, r. 1. The procedure on an appeal is regulated by Ord. 58.

(*e*) See Ord. 58, r. 15.

(*f*) See Ord. 58, r. 3.

(*g*) *Newman v. Beaumont*, Owen, 50; 4 Burn, E. L. 293; Godolph. Pt. 2, c. 31, s. 4.

(*h*) *Pratt v. Stocke*, Cro. Eliz. 315; Toller, 126.

And the practice was, to call in and revoke the first administration before the second was granted (*i*). But where it was found impossible to get the first administration brought in it was decreed null and void, and another was decreed to issue to the person lawfully entitled (*k*). So, before revocation of a probate, the Court will not grant a new one (*l*).

It remains to consider what are sufficient grounds for the revocation of a probate or letters of administration.

What are sufficient grounds for the revocation or reversal: of probates:

It has already appeared, that where an executor obtains probate of a Will in common form, he may be afterwards cited by a next of kin, to prove it *per testes*, or in solemn form (*m*). And upon this citation, if the executor does not sufficiently prove the Will, the probate will be revoked.

If the Will has been proved in solemn form, either by the executor himself in the first instance, or upon citation as above stated, and the next of kin have been cited to see proceedings, they cannot afterwards, by a fresh citation, again put the executor on proof of the Will (*n*). But if fraud can be shown, or if a later distinct Will be set up, then the parties having an interest under such later Will may again cite the executor, who has succeeded in proving in solemn form, and obtain a revocation of the probate (*o*).

It was held in *Nicol v. Askeu* (*p*), that probate of a testamentary paper, in the nature of a codicil, having been granted by consent in common form, could not afterwards be revoked on the allegation that the conditions on which such consent was given had not been complied with, there being no proof of fraud or circumvention practised either upon the Court or the parties.

In the case of *In the goods of Dye* (*q*), where a married woman, joint executrix, had proved, but had not intermeddled,

(*i*) Toller, 126.

(*k*) *Baker v. Russell*, 1 Lee, 167; *Scotter v. Field*, 6 Notes of Cas. 182; *In the goods of Langley*, 2 Robert. 407, where an administration granted to a woman, falsely swearing herself to be the wife of the deceased, was, after the necessary decrees had been taken out, and attempts made to serve her, but without success, declared to be null and void, and administration decreed to the lawful widow, notwithstanding the prior administration was outstanding.

(*l*) Toller, 75; *Rains v. Commissary of Canterbury*, 7 Mod. 146, 147.

(*m*) *Ante*, p. 236.

(*n*) *Ante*, p. 236 *et seq.*

(*o*) Wentw. Off. Ex. 111, 112, 14th edit.

(*p*) 2 Moore, P. C. C. 88.

(*q*) 2 Robert. 343. And see *In the goods of Reid*, 11 P. D. 70.

and the Bank of England refused to allow a transfer of stock in the absence of the husband, who was in foreign parts, Sir H. Jenner Fust revoked the probate and decreed probate to the other executor alone.

of letters of
administra-
tion :

With respect to the question as to what shall be a just ground for the revocation of letters of administration: it has been said, that at common law the Ordinary might repeal an administration at his pleasure (*r*): but now since the statute 21 Hen. VIII. c. 5, when it is granted, it cannot be repealed, unless for a just cause (*s*). So where administration is granted without the obligation of the statute, as administration *durante minore ætate*, it was held that when the Ordinary had once exercised his power by granting the administration, he should not repeal it without due cause (*t*). Again, though the Court has power to revoke a limited administration, it is very unwilling to do so, unless there was some misrepresentation in the first instance in obtaining the grant (*u*).

when granted
to next of
kin :

It was at one time doubted whether the Ordinary could revoke or repeal administration on any ground, but it is now agreed that the administration, though granted to a next of kin, may be repealed by the Court, not arbitrarily, yet where there shall be just cause for so doing; of which the Temporal Courts are to judge (*x*).

Therefore the administration may be revoked where it was granted in an irregular manner, as where a next of kin comes too hastily to take out the administration within the fourteen days (*y*): or where it has been granted *non vocatis jure vocandis*, without citing the necessary parties (*z*): in which cases, the administration, though not void, is voidable.

next of kin
non compos :
or beyond
sea :

Again, the administration may be revoked, if a next of kin, to whom it has been committed, becomes *non compos*, or otherwise incapable (*a*), or, it has been said, if he goes beyond sea (*b*);

(*r*) *Brown v. Wood*, Aleyn, 36; Godolph. Pt. 2, c. 31, s. 4.

(*s*) Treat. on Eq. Bk. 4, Pt. 2, c. 1, s. 5.

(*t*) *Grandison v. Dover*, Skinn. 155.

(*u*) *Lopes v. Hartley*, 7 Notes of Cas. Supplement, p. xxxi.

(*x*) Burn, E. L. 293; 3 Bac. Abr. 50 tit. Executors (E. 3) 12. See *Roster v. Sapte*, 1 Curt. 691.

(*y*) 3 Bac. Abr. *ubi supra*.

(*z*) Com. Dig. Administrator (B. 8): *Ravenscroft v. Ravenscroft*, 1 Lev. 305.

(*a*) Agreed by all the justices in *Offley v. Best*, 1 Sid. 373; Bac. Abr. *ubi supra*; 4 Burn, E. L. 292; Com. Dig. Administrator (B. 8). See *ante*, p. 416 *et seq.*

(*b*) Bac. Abr. *ubi supra*.

but the ordinary practice if the executor is disabled from acting, as if he becomes a lunatic or incapable of legal action, is for the Court to make a temporary grant during the incapacity (e). Where one of three executors who had proved a Will subsequently became of unsound mind, the Court, on the application of the others, revoked the grant and made a fresh grant to the applicants, reserving power to the lunatic, in case he should recover his sanity and apply, to join in the probate (d).

A fortiori, the Court may repeal its grant of administration, when made to other than the next of kin, as if it be granted to a next of kin, together with one not of kin, as to a sister and her husband (e): or to one of kin, but not next of kin (f): or to a creditor before the renunciation of the next of kin (g). In these cases, the administration is not void, but voidable only (h).

In the case of *In the goods of Ferrier* (i), the tenant for life of certain property having assigned over his interest to the remainderman, an administration with the Will annexed, which had been granted to the tenant for life, *limited* to that interest, was revoked, and a new administration, limited to that property, decreed to the remainderman, then possessed of the sole interest therein.

In another case a creditor, having obtained an administration *cum testamento annexo*, and completely settled his own debt, went away: Sir John Nicholl said, he saw no other remedy, than that the administration should be revoked, and the executor should retract his renunciation, and be allowed to take probate of the Will; otherwise great loss might accrue, and injustice be done; and the learned judge observed, that the Court has greater authority over an administrator with the Will annexed, granted to a creditor, than over an administration under the statute (j). A creditor, except by the practice of the Court, has no right to administration, he has no right by statute

when granted
to one not
next of kin:

when granted
*cum testamento
annexo* :
to tenant for
life who
assigns over
to remainder-
man, limited
to particular
property:

to creditor:

(e) See *ante*, p. 416.

(d) *In the estate of Shaw*, [1905] P. 92; and see *In the goods of Sowerby*, 65 L. T. 764.

(e) *Brown v. Wood*, Aleyn, 36; Com. Dig. Administrator (B. 8).

(f) *Blackborough v. Davis*, 1 Salk. 38; *Anon.*, Hetley, 48.

(g) *Ibid.*; Com. Dig. Administrator (B. 6).

(h) *Ibid.*

(i) 1 Hag. 241. See *In the goods of Reid*, 11 P. D. 70.

(j) *In the goods of Jenkins*, 3 Phillim. 33. And where a grant of administration of the estate of an intestate was made to a creditor who, after his debt had been fully satisfied, absconded, and could not be found, the Court revoked the grant to the creditor, without citing him, and made a new grant to the sole next of kin of the deceased:

but not
general ad-
ministration
where ad-
ministratrix,
married
woman, had
intermeddled:

and is the appointee of the Court (*k*). But where an administratrix, a married woman to whom *general* administration with the Will annexed had been granted while sole, and who had intermeddled with the general estate, desired to have the administration revoked and a new administration granted to her brother, because her husband, without whose concurrence she could not convey certain leasehold property she had contracted to sell as administratrix, had deserted her some six years previously, and had not since been heard of; the Court of Appeal, affirming Butt, J., held the administration could not be revoked, the administratrix having intermeddled with the general estate (*l*).

Where the original administrator of a deceased intestate had disappeared and could not be traced, and the remaining next of kin declined to renounce or to apply for a grant, the Court revoked the letters of administration which had been granted to the deceased's brother and made a fresh grant at the instance of a creditor (*ll*).

to next of
kin:

Administration *cum testamento annexo*, whether granted to a next of kin, or one not next of kin, is voidable, and may be repealed, if there be a residuary legatee (*m*).

Although it has always been the law that upon an executor's renunciation, and administration having been committed to another, the executor could not retract his renunciation and assume the executorship, yet questions used to arise as to the revocation of administration granted in the case of an executor who would not renounce, or take any step. Such cases, however, cannot now arise since the passing of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79, and the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 16, except perhaps in a

In the goods of Bradshaw, 13 P. D. 18. These cases were followed and extended to the case of an administrator *de bonis non*, who was not a creditor but a grandson, and one of the residuary legatees, in the later case of *In the goods of Covell*, 15 P. D. 8. See also *In the goods of Loveday*, [1900] P. 154; *In the goods of Colclough*, [1902] 2 Ir. R. 499; and *In the estate of Thomas*, [1912] P. 177.

(*k*) *Menzies v. Pulbrook*, 2 Curt. at p. 850, per Sir H. Jenner.

(*l*) *In the goods of Reid*, 11 P. D. 70. This case is a little difficult to reconcile with the decision of Sir John Nicholl: *In the goods of Jenkins*, *ubi supra*. See also *post*, p. 465; and cf. *In the goods of Dye*, 2 Robert. 343, *ante*, p. 459. And see *In the estate of Thacker*, [1900] P. 15.

(*ll*) *In the estate of French*, [1910] P. 169.

(*m*) Godolph. Pt. 2, c. 31, s. 3; and see *ante*, p. 377 *et seq.*

case where the Court grants administration without knowing that the executor has acted (*n*).

In the case of *Trimlestown v. Trimlestown* (*o*), an administration with a Will annexed, obtained after a *caveat* entered had expired, but without notice to the adverse party, and while the Will was in suit in Ireland—the *forum domicilii*—was revoked, as surreptitiously obtained, and the party condemned in costs of a petition in support of it.

If administration be repealed *quia improvide*, that is, where on a false suggestion in respect to the time of the intestate's death, it issued before the expiration of a fortnight from that event, Toller says administration shall be granted to the same person: So where the Court in committing administration took security inadequate to the value of the property (*p*).

re-grant *ad eundem* after a revocation *quia improvide*, &c.

The following grounds for revocation have also been held to be sufficient (*q*).

Where a woman claiming to be the widow of the intestate, but who had not been legally married, obtained administration to the deceased as her husband, the grant was revoked (*r*): and so in a case where persons who claimed to be next of kin to the intestate but who were in reality only illegitimate relatives had obtained administration (*s*). The fact that the person of whose estate administration has been granted is still living is, of course, a sufficient ground for revocation (*t*).

Other grounds for revocation

Where the Court of Chancery after grant made has differed from the Prerogative Court in its construction of the Will, as in a case where the Prerogative Court had granted letters of administration to the next of kin *cum testamento annexo*, and refused it to the residuary legatee, on the ground that the residuary bequest was void, and the Court of Chancery subse-

(*n*) See *ante*, pp. 192, 199. But the Court will still, in special circumstances, permit an executor to retract his renunciation: *In the goods of Stiles*, [1898] P. 12; and see *In the estate of Toscani*, [1912] P. 1.

(*o*) 3 Hagg. 243.

(*p*) Toller, 125; Com. Dig. Administrator (B. 8); *Offley v. Best*, 1 Sid. 293. See, however, *Webb v. Field*, in the Prerogative Court, 1849, cited in Tristram & Coote's Probate Practice, 15th edit. p. 241, note (*t*).

(*q*) See Tristram & Coote's Probate Practice, 15th edit. p. 238 *et seq.*, and Mortimer's Probate Law and Practice, p. 430 *et seq.*

(*r*) *In the goods of Moore*, 3 Notes of Cas. 601.

(*s*) *In the goods of Bergman*, 2 Notes of Cas. 22.

(*t*) *In the goods of Napier*, 1 Phillim. 83. See *post*, p. 467.

quently held that the bequest was good, and that the residuary legatee took a beneficial interest under it (*u*).

Where administration has been granted to the elected guardian of the intestate's children, there being a testamentary guardian who had not renounced (*v*).

Where a creditor having paid his debt was desirous *bonâ fide* of retiring from the administration of the estate the Court revoked the grant to the creditor, and made a new grant to one of the next of kin (*y*).

If administration (with a Will only annexed) has been granted and a codicil is afterwards found, a separate grant cannot be made of the latter, as in the case of a probate, but the administration with the Will annexed must be revoked and a new administration taken with both the Will and codicil annexed (*z*).

The Court requires the revoked grant to be produced and delivered to the registrar at the time of its revocation, so that it may be cancelled. If, however, owing to the grantee having left the country, it is impossible to compel the production of the grant, the Court will revoke it though it cannot cancel it (*a*). Where administration was revoked and a new administration was granted and the revoked grant had been lost, Sir C. Cresswell required an undertaking to be given to bring in the lost grant, if found, and that it would not be acted on (*b*).

Caveat.

It is usual, where there is a question about a Will, or when the right of administration comes in dispute, to enter what is called a *caveat* (which is a caution entered in the Court of Probate to stop probates, administrations, faculties, and such like from being granted without the knowledge of the party that enters) (*c*). A *caveat* remains in force for six months, and may be renewed (*d*).

What is not a ground for revocation.

If administration be granted to a younger brother, the elder

(*u*) *Warren v. Kelson*, 28 L. J. P. & M. 122; 1 Sw. & Tr. 290.

(*v*) *In the goods of Morris*, 2 Sw. & Tr. 360.

(*y*) *In the goods of Hoare*, 2 Sw. & Tr. 361, n.; *In the estate of Thacker*, [1900] P. 15.

(*z*) *Tristram & Coote's Probate Practice*, 15th edit. p. 241.

(*a*) *Baker v. Russell*, 1 Cas. temp. Lee, 167; *Scotter v. Field*, 6 Notes of Cas. 182; *In the goods of Langley*, 2 Robert. 407.

(*b*) *In the goods of Carr*, 1 Sw. & Tr. 111.

(*c*) 3 Burn. E. L. 244, Phillim. edit.

(*d*) See P. R. 1862 (Non-contentious), Rule 60. The practice as to caveats is now regulated by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 53, and the rules of 1862, P. R. Nos. 59, 60, 61, 62, 63, 64, 65, 66, 67. See Mortimer on Probate, p. 515 *et seq.*

cannot have it repealed, unless it has been granted by surprise (*e*). So if administration be granted to a creditor, and afterwards a creditor to a larger amount appear, it shall not be revoked for him (*f*). So also administration *de bonis non*, with the Will annexed, granted to one where two had equal right, is good and shall not be revoked (*g*). It is stated in *Thomas v. Butler* (*h*) that it was the practice of the Delegates to repeal an administration, though granted to the next of kin, in the case of abuse. Sir Matthew Hale, however, said that therein they exceeded their powers, and that a prohibition ought to go; and that they ought to take sufficient caution in the first instance to prevent maladministration (*i*). Nor can the Court revoke it on account of the administrator's omission to bring an inventory and account (*j*).

And if an administration has been properly granted, it cannot be revoked, even on the application of the administrator himself, and although he has not intermeddled with the effects; at all events, unless some strong ground for the revocation be shown (*jj*). Therefore, where a party entitled in distribution to an intestate's effects took out administration under a belief that she and her brother were the only next of kin, but finding there were other parties equally entitled, and that the estate must be administered by the Court of Chancery, and not having intermeddled with the effects, she applied for a revocation of her grant and a new one to one of the other parties who was willing to take it, the rest consenting; the Court refused the application, on the ground that an administration, properly granted, could not be revoked on a mere suggestion that it would be for the benefit of the estate (*k*).

It was at one time considered that the Court could not revoke a grant on the application of a creditor, whatever might be the

(*e*) *Ayliff v. Ayliff*, 2 Keb. 812. So where a niece obtained administration, a nephew could not get it repealed: *Hill v. Bird*, Sty. 102; and see *ante*, p. 339.

(*f*) *Dubois v. Trant*, 12 Mod. 438.

(*g*) *Taylor v. Shore*, T. Jones, 161.

(*h*) 1 Vent. Pt. 1, 219 (24 Car. II.).

(*i*) 1 Vent. Pt. 1, 219 (24 Car. II.).

(*j*) *Hill v. Bird*, Sty. 102.

(*jj*) Revocation on the application of the administrator was permitted in *In the goods of Hoare*, 2 Sw. & Tr. 316 n.; *In the goods of Thacker*, [1900] P. 15.

(*k*) *In the goods of Heslop*, 1 Robert. 457; and see *In the goods of Reid*, 11 P. D. 70.

merits of the case; because a creditor could not demand a grant to be made to himself of immediate right (*l*). But it has since been decided that there is no reason in principle why creditors should be precluded from applying to revoke an existing grant (*m*).

The Court will not revoke a grant limited to attending proceedings in the Court of Chancery in order to enable the next of kin to take a general grant; the right course is for the next of kin to take a *cæterorum* grant (*n*).

How far a party who has once propounded a Will and withdrawn is barred.

In the case of *Trower v. Cox* (*o*), the attorneys of an executrix had withdrawn from the suit, after propounding an alleged Will, and suffered a next of kin to take administration; and it was held, *under the particular circumstances* of the transaction, that the executrix was not barred from calling upon the next of kin to bring in the administration, and re-propounding the alleged Will. But in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorise a practitioner to take that step for them, the Court, as far as it legally can, will hold them bound (*p*).

Bare executor cannot call validity of Will in question.

An executor who has proved a Will in common form cannot, as such executor, take proceedings to call in question the validity of that Will. He has no right, therefore, to cite the persons interested under it, to propound it in solemn form, or show cause why the probate in common form should not be revoked. The executor of an executor is in the same position in this respect as the original executor (*q*). But in the case of *Williams v. Evans* (*r*), an executor, who was also next of kin of the testator, was held not to be disabled from taking proceedings to obtain revocation of probate, upon a satisfactory explanation being given for his having taken probate.

Citation by next of kin, contesting a Will, of all persons interested "to see proceedings."

Where a next of kin is cited by an executor to see a Will propounded, and contends for an intestacy, he may issue a citation, calling upon all persons interested under the Will "to see proceedings"; for although it is true, that the act of the

(*l*) Tristram & Coote, 14th edit. p. 181, citing *In the goods of Bergman*, 2 Not. of Cas. 22.

(*m*) *In the estate of French*, [1910] P. 169; *ante*, p. 462.

(*n*) *In the goods of Brown*, L. R. 2 P. & D. 455.

(*o*) 1 Add. 19.

(*p*) 1 Add. 225.

(*q*) *In the goods of Chamberlain*, L. R. 1 P. & D. 316.

(*r*) [1911] P. 175.

executor, being the appointee of the deceased, would, to a certain extent, bind all persons interested under the Will (*s*), yet some party might, perhaps, at a future time, allege collusion (*t*). If any of the legatees or other persons interested happen to be dead, care should be taken to cite their representatives (*u*).

The parties thus cited need not appear at all; and in ordinary cases, if they intervene, when an executor, the person entrusted by the testator to see his Will executed, is before the Court, they will not be allowed their costs out of the estate (*v*).

Where two parties appear *before* any administration has been granted, both are to propound their interests, and proceed *pari passu* (*x*). But where an administration has been regularly obtained, the person in possession of it is not bound to propound his interest, till the party calling it in question has established his own (*y*).

Party in possession of administration not bound to propound his interest.

When probate has been granted of the Will of an officer in the army, on the affidavit of his brother and executor, that he had received intelligence that the testator had been killed in battle, which he believed to be true, but this was in fact unfounded, the proctor for the executor brought and left in the registry the probate, and the Court, on motion of counsel, by an interlocutory decree, revoked the same, and declared it to be null and void to all intents and purposes: At the same time the supposed deceased appeared personally, and the judge, at his petition, decreed the original Will, together with the probate first cancelled, to be delivered out of the registry to him (*z*).

Revocation of probate of Will of one falsely supposed to be dead.

(*s*) See *Wood v. Medley*, 1 Hagg. 657, 658, 667, 668.

(*t*) *Colvin v. Fraser*, 1 Hagg. 107; and see *ante*, p. 239.

(*u*) *Colvin v. Fraser*, *ubi supra*.

(*v*) *Colvin v. Fraser*, 2 Hagg. 368.

(*x*) *Ante*, p. 336.

(*y*) *Dabbs v. Chisman*, 1 Phillim. 155; *Hibben v. Calemberg*, 1 Phillim. 166.

(*z*) *In the goods of Napier*, 1 Phillim. 83.

CHAPTER THE THIRD.

THE EFFECT OF REVOCATION OF PROBATE, OR LETTERS OF ADMINISTRATION, ON THE MESNE ACTS OF THE EXECUTOR OR ADMINISTRATOR.

IT remains to consider what effect the revocation of probate or letters of administration has on the intermediate acts of the former executor or administrator.

Before dealing with the principles governing the effect of revocation, and the cases decided thereon, it seems desirable to call attention to the statutory enactments which have, to the extent therein provided, rendered inapplicable the old principles and cases.

Stat. 20 & 21
Vict. c. 77,
s. 77.
Payments
under revoked
probates or
administra-
tion to be
valid.

By sect. 77 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is expressly enacted that "where any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall be a legal discharge to the person making the same, and the executor or administrator, who shall have acted under any such revoked probate or administration, may retain, and reimburse himself in respect of, any payments made by him, which the person, to whom probate or administration shall be afterwards granted, might have lawfully made."

Sect. 78.
Persons
making pay-
ments upon
probates or
administra-
tion to be in-
demnified.

And by sect. 78 it is enacted that "all persons and corporations, making, or permitting to be made, any payment or transfer *bonâ fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

Former
distinction
between void

As regards the validity of dealings with the estate by the holder of a grant which is afterwards revoked, a distinction

was formerly drawn between grants which were regarded as void *ab initio*, *i.e.*, where the grant was in derogation of the right of an executor; and such as were regarded as merely voidable; *i.e.*, where the administration had been granted by the proper jurisdiction, and was only in derogation of the rights of the next of kin, or of a residuary legatee. If the grant were of the former description, it was said that the mesne acts of the executor or administrator, done between the grant and its revocation, except in so far as they were protected by the above-mentioned statutes, could be of no validity.

Thus in *Grazebrook v. Fox* (a), it was held in 1565 on demurrer that, if A. makes his Will and appoints an executor and the Ordinary after his death commits administration to another, who sells the goods of the deceased, and the executor afterwards proves the Will and brings detinue for the goods against the purchaser, the probate supersedes the administration *ab initio* and the sale made under it. The Court, however, expressed the opinion that if the administrator had aliened the goods to pay the funeral expenses or debts of the deceased which the executor was compellable to pay, the sale would have been good and indefeasible (b).

Again, in *Abram v. Cunningham* (c), decided in 1677, upon the death of an executor the Ordinary granted administration *de bonis non* of an original testator to a creditor, where the executor had in fact made a Will appointing executors, which Will was "concealed" (as stated in the report in Levinz), or which was "afterwards discovered" (as stated in the reports of the case in Ventris and Freeman), and it was held, after the administration granted to the creditor had been revoked and administration of the estate had been granted to the defendant, that a sale of a term made thereunder was also void. Saunders, who argued for the plaintiff, admitted "that where an executor is *in esse*, who after proves the Will, administration granted in the meantime, without notice of the Will, and all mesne acts done by such an administrator, are void," citing *Grazebrook v. Fox* (d). So in 1822, in the case of *Woolley v. Clark* (e),

(a) 1 Plowd. 275.

(b) 1 Plowd. 282, 283. See *ante*, pp. 189, 190; *Coulter's Case*, 5 Co. 30, b; *Parker v. Kett*, 1 Lord Raym. 661, *ante*, p. 189.

(c) 2 Lev. 182; 1 Vent. 303; Freem. K. B. 445.

(d) 1 Plowd. 275.

(e) 5 B. & Ald. 744. And see *ante*, p. 188, where this case is commented on, so far as it held that the defendant was not entitled in

a Will was proved by the executor named in it, who after probate sold the goods of the testator; at the time of the sale he had notice of a subsequent Will, which was afterwards proved by the executor named in it, and the probate of the former Will revoked on citation: whereupon the executor under the latter Will brought trover against the executor under the former for the goods sold, and it was holden that the action was sustainable to recover the full value (*f*).

In *Boxall v. Boxall* (*g*), decided in 1884, a grant of letters of administration obtained by suppressing a Will containing no appointment of executors was held *not to be void ab initio*, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under these circumstances to a purchaser who was ignorant of the suppression of the Will was upheld by the Court, although the grant was revoked after the sale. In this case, Kay, J., considered that *Abram v. Cunningham* (*h*) was decided on the ground that the concealed Will had appointed executors, who therefore had a right of property vested in them before probate, and not upon the fraud committed in concealing the Will.

But even in cases where the grant was regarded as void, if the wrongful executor or administrator had sold the property of the deceased, the rightful representative might either maintain trover or detinue, or he might bring assumpsit for the money produced by the sale, as so much money received to his use, as executor or administrator; for the plaintiff might waive the tort, and suppose the sale made with his consent (*i*).

In *Ellis v. Ellis* (*k*), decided in 1905, Warrington, J., held

mitigation of damages to show that he had administered assets to the amount claimed.

(*f*) As Phillimore, L. J., pointed out in *Hewson v. Shelley*, [1914] 2 Ch. at p. 42, this was not an action against the purchaser from an administrator, but against the administrator himself, who sold property at his peril at a time when he had notice of a later Will which ultimately received probate.

(*g*) 27 Ch. D. 220.

(*h*) 2 Lev. 182; 1 Vent. 303; Freem. K. B. 445; *supra*, p. 469.

(*i*) *Lamine v. Dorrell*, 2 Lord Raym. 1216. Where an auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment the real executrix claimed the money from the buyer, it was held that the auctioneer could not afterwards maintain an action against the buyer, though the latter expressly promised to pay on being allowed to take away the goods: *Dickenson v. Naul*, 4 B. & Adol. 638. See also *Crosskey v. Mills*, 1 Crompt. M. & R. 298; *Allen v. Hopkins*, 13 M. & W. 94.

(*k*) [1905] 1 Ch. 613.

that an equitable mortgage of a lease by an administrator, whose grant had been revoked on the subsequent probate of a Will appointing an executor, was in the circumstances of the case before him a voluntary act, and that in fact no title was conferred by it. The learned judge, after reviewing *Grazebrook v. Fox* (l), *Abram v. Cunningham* (m), and *Boxall v. Boxall* (n), said: "Unfortunately for the plaintiffs, there was in existence a Will by which an executor was appointed; the Will was duly proved, and the administration was revoked. Under those circumstances, I think it is clear law that the grant of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them, and no power of dealing with them (o).

The result of these cases, therefore, was that where letters of administration had been granted in the *bonâ fide* belief that the deceased had died intestate, and the administrator sold the property of the deceased, and afterwards a Will appointing executors was found, and the letters of administration revoked, the acts of the administrator (unless saved by sects. 77 and 78 of the Court of Probate Act, 1857, and with the possible exception of alienations to discharge debts which the executors were compellable to pay), were regarded as void, and the executors could recover even against a *bonâ fide* purchaser for value without notice of the Will. And that situation was not confined to cases where no Will was found or believed to exist, nor to cases of a lost Will and letters of administration granted. If the deceased died leaving a Will whereby he appointed executors and they proved and sold, the case would be the same if subsequently a later Will came to light by which the former Will was revoked, and other executors appointed. In this state of the law, it was difficult to see how anyone could ever accept a conveyance from a legal personal representative, and as Buckley, L. J., pointed out in *Hewson v. Shelley* (p), if such was the law, it urgently required to be set right by legislation.

(l) *Ante*, p. 469.(m) *Ante*, p. 469.(n) *Ante*, p. 470.(o) And see *Craster v. Thomas*, [1909] 2 Ch. 348, where *Ellis v. Ellis* was distinguished, the learned judge deciding the case on the construction of the Indian Succession Act, 1865.

(p) [1914] 2 Ch. 13, 31.

Decision in
Hewson v.
Shelley that
revoked
grants *not*
void *ab initio*;
former
decisions to
contrary over-
ruled.

But these decisions, which proceeded on the view that the assets of the deceased were vested in the executor (where there was a Will appointing executors) from the death of the testator, and could not be divested and vested in another, even temporarily, by the Ordinary or the Court of Probate, were overruled by the decision of the Court of Appeal in *Hewson v. Shelley* (*q*), decided in 1914, by which it was held that until the Ordinary was concluded by probate he had for the benefit of all those interested the power to commit administration and to pass the property thereby, subject to that administration being recalled and the power and title of the administrator determined upon production possibly, upon probate certainly, of a Will (*r*). In that case letters of administration were granted to the widow of a man who was believed to have died intestate, and the administratrix, as personal representative of the deceased, by virtue of the Land Transfer Act, 1897, sold and conveyed to a purchaser a portion of the deceased's real estate. Upon the subsequent discovery of a Will the executors appointed thereby obtained a revocation of the letters of administration and a grant of probate to themselves. In an action by the executors to recover possession of the real estate sold by the administratrix, it was held by Astbury, J. (*s*), following *Grazebrook v. Fox* (*t*), *Abram v. Cunningham* (*t*), and *Ellis v. Ellis* (*u*), that the grant of administration was void *ab initio* and that the sale of the real estate by the administratrix was also void. This decision was reversed by the Court of Appeal (*w*), the Master of the Rolls, and Buckley and Phillimore, L. JJ., holding that the grant of administration was not void *ab initio*, and that the purchaser had acquired a good title. It was held, also, that even if the grant of administration had been void for want of jurisdiction, it was an order of the Court by virtue of which the purchaser's title would have been protected under sect. 70 of the Conveyancing and Law of Property Act, 1881.

The cases of *Grazebrook v. Fox* (*t*) and *Abram v. Cunningham* (*t*) were overruled, in spite of the amount of authority and acceptance which they had enjoyed. The reasons for which the Court of Appeal refused to follow the actual decisions

(*q*) [1914] 2 Ch. 13, 31.

(*r*) *Per* Phillimore, L. J., [1914] 2 Ch. at p. 44.

(*s*) [1913] 2 Ch. 384.

(*u*) *Supra*, p. 470.

(*t*) *Supra*, p. 469.

(*w*) [1914] 2 Ch. 13.

in these cases were stated by Phillimore, L. J., as follows: That the reasoning in the principal case laid down no consistent rule; that it was in conflict with an earlier case in the Year Book; the two cases were decided at a time of unfortunate jealousy of the Courts Christian; that they were in conflict with the principles established by a body of unquestioned authorities; that to follow them would be to establish that a number of void orders are made as matters of course by the High Court of Justice; and that such a decision would put serious difficulties in the way of the realisation of the estates of all deceased persons (z).

A distinction has also been drawn between the case of a suit by citation, which is to countermand or revoke a former probate or former letters of administration, and an appeal, which is always to reverse a former sentence (a). In case of an appeal all intermediate acts of the executor or administrator are ineffectual; because the appeal suspends the former sentence (b); and on its reversal it is as if it had never existed (c).

But if the suit be by citation, and the grant of administration be voidable only, as where it has been granted to a party not next of kin (d), or where the executor having acted, and the Court, not knowing it, committed administration to another (e), or *non vocatis jure vocandis*, without citing the necessary parties (f), all lawful acts done by the first administrator shall be valid: as a *bonâ fide* sale by him of the goods of the intestate (g), and such sale shall be available, even if it were with intent to defeat the second administrator, or were made *pendente lite*, on the citation (h); although by stat. 13 Eliz. c. 5, it be void as to a creditor (i). And since the decision in *Hewson v. Shelley* (k) the same ruling will, it seems, apply to grants of administration made in derogation of the right of an executor, which grants were formerly considered to be void

Distinction
between suit
by citation
and an appeal.

(z) *Hewson v. Shelley*, [1914] 2 Ch. at pp. 45, 46.

(a) *Packman's Case*, 6 Co. 18, b; and see *ante*, p. 458.

(b) *Price v. Parker*, 1 Lev. 158.

(c) 6 Co. 18, b. Many such intermediate acts are now protected by the sections of 20 & 21 Vict. c. 77, cited *supra*, p. 468.

(d) *Ante*, p. 461.

(e) *Ante*, p. 193.

(f) *Ante*, p. 460.

(g) *Wadesworth v. Andrews*, cited Dyer, 166, b, in marg.

(h) Bro. Abr. Administrator, pl. 33; *Packman's Case*, 6 Co. 18, b.

(i) 6 Co. 18, b; Treat. on Eq. Pt. 2, c. 1, s. 5.

(k) [1914] 2 Ch. 13, *vide ante*, p. 472.

ab initio (l). Again, if the administration be granted on condition, all the acts which the administrator does before the breach of the condition are good: so that the subsequent administrator cannot avoid any gifts or sales before such breach made by such conditional administrator (m). So if administration be committed to a creditor, and after repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator, and his disposal of goods, even pending his citation, till sentence of repeal, is good (n). And where there was a citation to repeal administration, but the grant was affirmed and administration granted to another, upon which an appeal was sued, and both sentences repealed, an assignment of a lease, made by the first administrator in the meantime, was held good (o): for the repeal was merely of the sentence in the citation, and so it is all one as if the administration had been avoided in the suit upon the citation.

But where an administrator sold a term charged with a trust, in trust for himself, although the administration was revoked on a suit by citation, and not on an appeal, the assignment was decreed to be set aside (p).

Payment to an executor or administrator under a void probate or administration is a discharge.

And even before the passing of 20 & 21 Vict. c. 77, it was held that payment to an executor, who had obtained probate of a forged Will, was a discharge to the debtor, notwithstanding the probate was afterwards declared null in the Ecclesiastical Court (q); on the principle that if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor, as long as the probate was unrepealed; and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it.

This, however, was to be understood only where the grant was revoked on citation; if it were reversed on appeal, the administrator's or executor's authority was as if it had never existed, and such payments would have been void (r).

(l) *Vide ante*, p. 469.

(m) 6 Co. 19, a; Godolph. Pt. 2, c. 31, s. 5.

(n) *Blackborough v. Davis*, 1 Salk. 38.

(o) *Semine v. Semine*, 2 Lev. 90.

(p) *Jones v. Waller*, 2 Chanc. Cas. 129.

(q) *Allen v. Dundas*, 3 T. R. 125, 129, where Ashhurst, J., says: "The foundation of my opinion is, that every person is bound by the judicial acts of a Court having competent jurisdiction: and during the existence of such judicial act, the law will protect every person obeying it."

(r) *Toller*, 131. But see now stat. 20 & 21 Vict. c. 77, s. 77, *ante*, p. 468.

It may be observed that where probate has been granted of the supposed Will of a living person, the Court having no jurisdiction to grant probate in the case of a living testator, the probate is a nullity and can have no effect (s).

Whether the administration be revoked on citation or appeal, if an action was brought by the administrator, and while it was pending administration was committed to another, the writ would formerly have abated (t). By sect. 76 of the Court of Probate Act (20 & 21 Vict. c. 77), "where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such Court may direct."

Abatement of suit by administrator by revocation of administration.

20 & 21 Vict. c. 77, s. 76.

Suggestion to be made on the record.

And since the Judicature Acts proceedings commenced by, or against, any administrator, before revocation of the administration, do not become abated, but upon such revocation they may be continued by, or against, the person to whom the new grant of administration is made. An order that the proceedings shall be carried on by or against such new administrator (as the case may be) may be obtained *ex parte* on application to the Court or a judge upon an allegation of the transmission of interest to the new administrator by such grant of administration to him (u).

No abatement of suit since Judicature Acts.

Modern procedure.

And if an administrator, before the repeal of the administration, obtain a judgment for a debt due to the intestate, the new administrator, upon the grant to him of administration, may apply to the Court or a judge for leave to issue execution, and the Court or a judge, if satisfied that he is entitled to issue execution upon such judgment, may make an order to that effect (x).

Where administration was granted, and afterwards there appeared to be an executor, if the administrator had paid debts,

The administrator under a void grant

(s) *Allen v. Dundas*, 3 T. R. at pp. 129, 130.

(t) *Bro. Administrator*, pl. 3; *Toller*, 131.

(u) R. S. C. Ord. xvii. rr. 1—5.

(x) R. S. C. Ord. xlii. r. 23.

to be recouped
in damages
for debts
paid, &c.
in the course
of his admin-
istration.

20 & 21 Vict.
c. 77, s. 77.

Proper plea
by adminis-
trator after
administra-
tion revoked.

legacies, or funeral expenses, which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup so much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, forasmuch as he himself would have been bound to pay it (*y*). So it was holden in equity, where a widow possessed herself of the personal estate as an executrix, under a revoked Will, and paid debts and legacies, but had no notice of revocation, that she should be allowed those payments (*z*). And now by stat. 20 & 21 Vict. c. 77, s. 77, it is expressly enacted "that the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made."

It was formerly held that a defendant sued as administrator might plead, that, *pendente brevi*, administration was committed to another (*a*). With respect to the proper plea, in a case where the administration is revoked before the action commenced; the defendant in *Garter v. Dee* (*b*), being sued as administrator, pleaded, that before the date of the writ, his administration was revoked and granted to another: *Per Wilde*: He ought to have set forth that he had fully administered all the goods in his hands, or else that he delivered them over to the new administrator (*c*). If he was sued as executor *de son tort* (*d*), and had delivered the assets over *before* action brought, *plene administravit* seems to have been held the proper plea (*e*).

(*y*) *Peckham's Case*, cited Plowd. 282; Bacon, Abr. Exors. (E. 13); and see the authorities mentioned, *ante*, pp. 189, 190, with respect to an executor *de son tort*. But the contrary seems to have been holden in *Woolley v. Clark*, 5 B. & A. 744, *ante*, p. 188.

(*z*) *Hele v. Stowel*, 1 Chanc. Cas. 126; Bac. Abr. Exors. (E. 13).

(*a*) Bro. Administrator, pl. 3.

(*b*) 1 Freem. 13.

(*c*) See also *Palmer v. Litherham*, Latch. 267; *Lawson v. Crofts*, 1 Keb. 114.

(*d*) See *Turner v. Davies*, 1 Mod. 63, by Kelynge, C. J.

(*e*) See *ante*, pp. 186, 187. These cases are retained in this Edition of this Work because, although they relate to the system of pleading as it existed before the Judicature Acts, they would still seem to be useful as indicating what facts will constitute a good defence in an action against an administrator, in cases where the administration is revoked before, or pending, action.

PART THE SECOND.

THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

THE TIME WHEN THE ESTATE OF AN EXECUTOR OR ADMINIS-
TRATOR VESTS: AND OF THE QUALITY OF THAT ESTATE.

In considering the nature of the estate which an executor or administrator has in the property of the deceased, it is proposed to inquire, 1. At what time his estate vests; 2. The quality of his estate.

CHAPTER THE FIRST.

THE TIME WHEN THE ESTATE OF AN EXECUTOR OR
ADMINISTRATOR VESTS.

AS the interest of an executor in the estate of the deceased is derived exclusively from the Will (*a*), so it vests in the executor from the moment of the testator's death (*b*). Thus where the demise by an executor, the lessor of the plaintiff in ejectment, was laid two years before he had proved the Will under which he claimed, it was held good (*c*). So where a testator had given a bailiff authority to distrain, but died almost immediately

Estate of
executor.

(*a*) *Ante*, p. 207.

(*b*) Com. Dig. Administration (B. 10); *Woolley v. Clark*, 5 B. & A. 745, 746.

(*c*) *Roc v. Summersett*, 2 W. Black. 692.

before the distress was taken: and, after it had been taken in his name, his executor ratified the distress; it was held that the plaintiff might well avow as the bailiff of the executor: because the rent was due from the estate, and the law knows no interval between the testator's death and the vesting of the right in his executor: as soon as he obtains probate, his right is considered as accruing from that period (*d*).

Estate of administrator;
property vests in him
only from
time of grant.

On the other hand, an administrator derives his title wholly from the Court: he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (*e*).

Accordingly, no right of action accrues to an administrator until he has sued out letters of administration. In an action on a bill of exchange by an administrator, where the bill was accepted after the death of the deceased, and the acceptance, and also the day of payment, was more than six years before the commencement of the suit, but the granting of administration was less than six years before, it was held that the Statute of Limitations began to run from the date of administration, and not from the day of payment, since there was no cause of action until the administration was granted (*f*). So where to a declaration in trover by an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, afterwards, and after the death of the intestate, to wit, on, &c., converted the same goods, it was pleaded that the defendant was not guilty of the premises within six years, such plea was held bad upon special demurrer, on the ground, that although it might be true that the defendant was not guilty within six years, yet the cause of action might have accrued to the plaintiff by the grant of letters of administration within that period (*g*).

When letters of administration relate back to the death of the intestate.

The proposition, however, respecting the vesting of an administrator's interest, must be taken with some qualification; for it seems clear that, for particular purposes, the letters of administration relate back to the time of the death of the

(*d*) *Whitehead v. Taylor*, 10 A. & E. 210.

(*e*) *Woolley v. Clark*, 5 B. & A. 745, 746; *Chetty v. Chetty*, [1916] A. C. 603.

(*f*) *Murray v. E. I. Company*, 5 B. & A. 204, *post*, Pt. v. Bk. I. Ch. I.

(*g*) *Pratt v. Swaine*, 8 B. & C. 285.

intestate, and not to the time of granting them (*h*). Thus, although it has been held that detinue cannot be maintained by an administrator against a person who has got possession of the goods of the intestate since his death, but has ceased to hold them prior to the grant of administration (*i*), yet an administrator may have an action of trespass (*k*) or trover for the goods of the intestate taken by one before the letters granted unto him; otherwise there would be no remedy for this wrong-doing (*l*). So where goods had been sold after the death of an intestate and before the grant of letters of administration, avowedly on account of the estate of the intestate, by one who had been his agent, it was held that the administrator might ratify the sale and recover the price from the vendee in assumpsit for goods sold and delivered (*m*). And accordingly it would seem that whenever any one acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back, in order not to lose the benefit of the contract, so that the administrator may sue upon it, as made to himself (*n*). And so if during the time when there is no personal representative of the estate of a deceased person, services have been rendered which not only were for the benefit of the estate, but also were rendered under a contract with some one who subsequently by becoming administrator became authorised to bind the estate, and ratified the contract, the estate of such deceased person is liable for such services (*o*). Further, it has been held on the bare doctrine of relation, that in a case where the administrator might maintain trover for

(*h*) Godolph. Pt. 2, c. 20, s. 6; 2 Roll. Abr. 399, tit. Relation (A.), pl. 1; 2 Roll. Abr. 544, Trespass (T.), pl. 1; *Middleton's Case*, 5 Co. 28 b; Com. Dig. Administration (B. 10); Wentw. Off. Ex. 115, 116, 14th edit.

(*i*) *Crossfield v. Such*, 8 Exch. 825.

(*k*) *Tharpe v. Stallwood*, 5 M. & Gr. 760.

(*l*) *Foster v. Bates*, 12 M. & W. 233, per Parke, B.; *Searson v. Robinson*, 2 Fost. & F. 351; and see *Re Pryse*, [1904] P. 301, where a receiver was appointed.

(*m*) *Foster v. Bates*, 12 M. & W. 226; and see *Re Pryse*, [1904] P. 301.

(*n*) *Bodger v. Arch*, 10 Exch. 333.

(*o*) *Re Watson, Ex parte Phillips*, 18 Q. B. D. 116, affirmed in the Court of Appeal, 19 Q. B. D. 234. See, however, the remarks of Lord Esher, M. R., in his judgment on appeal, who doubted whether an administrator after becoming administrator, and while acting in the interests of other persons, could have ratified a prior contract made with himself.

a conversion between the death of the intestate and the grant of administration, he may waive the tort and recover as on a contract: Thus, where money belonging to an estate at the time of the intestate's death, or due to him and paid in after his death, or proceeding from the sale of his effects after his death, has, before the grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, the administrator may recover it from such stranger as money had and received to his use as administrator (*p*). So it would seem the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property, for all matters affecting the same subsequent to the death of the intestate, and so as to render him liable to account for the rents and profits of it from the death of the intestate (*q*).

Effect of
the Land
Transfer Act,
1897.

It would seem that, in cases of real estate coming within the operation of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, in the absence of and until the constitution of a personal representative of the deceased the legal estate will devolve on the heir-at-law (*r*), and that upon administration being taken out the grant will have the effect of vesting the land in the administrator by relation so as to enable him to

(*p*) *Welchman v. Sturgis*, 13 Q. B. 552.

(*q*) *Rex v. Horsley*, 8 East, 410, in Lord Ellenborough's judgment. So it is laid down in Selw. N. P. 717, 6th edit., that in ejectment by an administrator, the demise may be laid on a day after the intestate's death, but before administration granted; for the administration, when granted, will relate back, and show the title to have been in the administrator from the death of the intestate. This point was expressly decided accordingly, by the Court of King's Bench in Ireland, after a full consideration, in *Patten v. Patten*, T. 3 W. 4; 1 Alcock & Napier, 493; and Bushe, C. J., in delivering judgment, regards this decision as reconcilable with that of *Keane v. Dee* (King's Bench, Ireland, June, 1821), 1 Alcock & Napier, 496, note (1), in which case it had been holden that an administrator could not justify a distress for rent (accrued out of a chattel term of the intestate after his death) made before the grant of the administration, on the ground that although letters of administration will operate by relation, to enable an administrator to recover a chattel property from the time of the death of the intestate, yet it does not effectuate a *legal proceeding*, taken before administration granted, in order to recover such property. See, however, *Bacon v. Simpson*, 3 Mees. & Wels. 87, in which case an administratrix, before she had taken out administration, had contracted to assign a term for years of the intestate in a leasehold house; and Parke, B., was of opinion, that an allegation, that she was lawfully possessed of the term at the time of the making of the contract, could not be supported. See also *ante*, pp. 315, 316.

(*r*) See observations of North, J.: *John v. John*, [1898] 2 Ch. 573, 576.

bring actions in respect of that property for matters affecting the same subsequent to the death of the intestate (s).

Although an executor *de son tort* cannot plead a retainer of his own debt, yet if, even *pendente lite*, he obtains administration, he may retain: for it legalizes those acts which were tortious at the time (t). And there has been already occasion (u) to point out other acts of an administrator before administration granted, which the relation of the letters in some measure renders valid. But the relation of the grant of administration to the death of the intestate, shall not, it is said, divest any right legally vested in another between the death of the intestate and the commission of administration. Thus, in *Waring v. Dewbury* (x), a landlord who had rent due to him, died intestate; after which the plaintiff in the action sued out execution against the defendant, who was the tenant, and levied the debt upon him; after this, administration was committed to J. S.; who thereupon came into the Court, and moved for a rule on the sheriff to pay him a year's rent out of the money levied, pursuant to the 8 Ann. c. 17, urging, that though he was not administrator at the time of serving the execution, yet as soon as the administration was committed, it had relation to the death of the intestate, and he might bring trover for goods taken between the death of the intestate and commission of the administration: But the Court held, that relations which are but fictions of law, should never divest any right legally vested in another, between the death of the intestate and the commission of administration; and the plaintiff in the action having duly served his execution, before the administrator had a right to demand his rent, it was not reasonable the plaintiff should be defeated by any relation whatsoever; they did not in that case deny the authorities which gave the administrator trover, but went on a distinction between relations that are to defeat lawful acts, and such as are to punish those that are unlawful (y).

(s) See *per* Stirling, L. J., *In the goods of Pryse*, [1904] P. 301, 305.

(t) *Curtis v. Vernon*, 3 T. R. 587, 590.

(u) *Ante*, pp. 316, 317.

(x) *Gilb. Eq. Rep.* 223, cited by Strange, *arguendo*, in *Rex v. Mann*; *S. C.*, 1 Stra. 97.

(y) See also *Rex v. Horsley*, 8 East, 405, *post*, p. 490, note (n). The rule that a party cannot be made a trespasser by relation is only applicable where the act complained of was lawful at the time: *Tharpe v. Stallwood*, 5 M. & Gr. 760.

Relation back
of title where
the deceased
had only a
special pro-
perty.

There appears, in some instances, to be the same relation back of the title of the personal representative in cases where the deceased had only a special property in the goods as where he had the absolute property. Thus, if an uncertificated bankrupt acquired goods after his bankruptcy, and died possessed of them, having been allowed to retain possession by the assignees, his administrator might maintain trover against a third party who had sold the goods between the period of the death of the intestate and the grant of the administration; for there was a good title in the bankrupt as against all the world but the assignees, and this title passes to his administrator (z). But there is no such relation back as to chattels in which the deceased had no personal interest, but held merely as the administrator of another: The bare circumstance of his dying in possession will not enable his personal representative to maintain trover even against a mere wrongdoer: for it will be a good defence that the right to the goods in question has devolved on the administrator *de bonis non* of the original intestate (a).

3 & 4 Wm.
IV. c. 27.

Administra-
tor to claim
as if he
obtained the
estate without
interval after
death of
deceased.

By stat. 3 & 4 Wm. IV. c. 27 (entitled *An Act for the Limitation of Actions and Suits relating to real property, &c.*), s. 6, it is enacted, that "for the purposes of this Act an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person, and the grant of the letters of administration" (b).

21 & 22 Vict.
c. 95, s. 19.

Between the
death of the
deceased and
the grant of
administra-
tion property
to vest in the
Judge
Ordinary:

By 21 & 22 Vict. c. 95, s. 19, "From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Judge of the Court of Probate for the time being in the same manner and to the same extent as heretofore they vested in the Ordinary."

All moveable goods, though in ever so many different and distant places from the executor, vest in the executor in possession, presently upon the testator's death (c): for it is a rule

(z) *Fyson v. Chambers*, 9 M. & W. 460.

(a) *Elliott v. Kemp*, 7 M. & W. 306.

(b) The section applies to an administrator claiming a chattel interest in land: *Re Williams*, 34 C. D. 558.

(c) *Wentw. Off. Ex.* 228, 14th edit.; 11 Vin. Abr. 240.

of law, that the property of *personal* chattels draws to it the possession (*d*). But it is otherwise of things immoveable, as leases for years of lands or houses: for of these the executor or administrator is not deemed to be in possession before entry (*e*). So of leases for years of a rectory, consisting of glebe lands and tithes for years, it may be doubtful if actual possession can be without actual entry into the glebe land (*f*). But in case of a lease for years of tithes only, it was held that the executor, though in never so remote a place, should instantly, upon the setting out thereof, be in actual possession to maintain action of trespass for taking them away (*g*).

distinction between chattels real and personal as to time of vesting in possession.

(*d*) 2 Saund. 47, b. n. (1), to *Wilbraham v. Snow*.

(*e*) Wentw. Off. Ex. 228, 14th edit. See the observations of Parke, B., in *Barnett v. Earl of Guildford*, 11 Exch. 32. But a *reversion*, of a term, which the testator granted for a part of the term, is in the executor immediately by the death of the testator: *Trattle v. King*, T. Jones, 170.

(*f*) Wentw. Off. Ex. 229, 14th edit.; 11 Vin. Abr. 240.

(*g*) *Ibid*.

CHAPTER THE SECOND.

THE QUALITY OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

THE interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which every one has in his own proper goods (*a*): For an executor or administrator has his estate as such in *auter droit* merely, viz., as the minister or dispenser of the goods of the dead (*b*).

The goods of the deceased not forfeited by attainder of executor, &c.

Therefore, if before the Act 33 & 34 Vict. c. 23, for the abolition of forfeiture for Treason and Felony, an executor or administrator had been attainted of treason or felony, the goods which he had as executor or administrator would not thereby have been forfeited (*c*): and though disabled by such attainder from suing *proprio jure*, he might still have maintained an action in *auter droit* as executor or administrator (*d*).

not applicable to the debts which the executor owes the Crown.

So, where an executor brought a *quo minus* in the Court of Exchequer, stating that he was not able to pay the King's debt, because the defendant detained from him 100*l.* which he owed to him as executor of J. S., it abated: because it could not be intended that the King's debt could be satisfied with that which the plaintiff should recover and receive as executor (*e*).

So though a lord of a villain might take all the villain's own goods, yet he might not take those which the villain held as executor (*f*).

Where the executor becomes

Upon this principle also, if the executor or administrator becomes bankrupt, with any property in his possession belong-

(*a*) Wentw. Off. Ex. 192, 14th edit.

(*b*) *Pinchon's Case*, 8 Co. 88, *b.*; 2 Inst. 236. An executor has the property only under a trust to apply it for payment of the testator's debts, and such other purposes as he ought to fulfil in the course of his office as executor: by Ashhurst, J., *Farr v. Newman*, 4 T. R. 621, 645.

(*c*) 1 Hale, P. C. 251; Hawk. P. O. Bk. 2, c. 49, s. 9.

(*d*) *Ante*, p. 155.

(*e*) Wentw. Off. Ex. 194, 14th edit.

(*f*) Lit. L. 2, c. 11, s. 192.

ing to the testator or intestate, distinguishable from the general mass of his own property, it is not distributable under the bankruptcy (*g*). The trustee cannot seize even money which specifically can be distinguished and ascertained to belong to the deceased, and not to the bankrupt himself (*h*). But where a person entitled to take letters of administration neglected to do so, yet remained in possession of the goods of the intestate for twelve years, and being so in possession became a bankrupt; and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees; it was held that these goods were within the stat. 21 Jac. I. c. 19, being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner: and that the assignees were therefore entitled to them (*i*). [Executors who continue to carry on their testator's business under a power in the Will in the firm name, are not liable to be adjudicated bankrupt as partners, but may be individually proceeded against as joint debtors (*k*).

It must be observed, that if the testator were a lessee for years, and the lease contained a proviso that if the lessee, or his executors, administrators, or assigns, shall become bankrupt, the lease shall become void, the bankruptcy of the executor will operate as a forfeiture of the lease, notwithstanding the lease itself does not pass to his assignees (*l*).

Where a trustee in bankruptcy possesses himself of effects, which belong to the bankrupt as executor only, the Court, upon application made to it, will order the return of such effects to

bankrupt, the goods of the testator do not pass:

proviso for forfeiture of lease, if lessee or his executor shall become bankrupt:

receiver appointed to whom assignees shall account:

(*g*) See Bankruptcy Act, 1883, s. 44 (1), now Bankruptcy Act, 1914, s. 38.

(*h*) By Lord Mansfield in *Howard v. Jemmett*, 3 Burr. 1369, cited by Lord Kenyon, in *Farr v. Newman*, 4 T. R. 621, 648. Under the bankruptcy of an executor and trustee, directed by the Will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable: *Ex parte Garland*, 10 Ves. 110. See *post*, Pt. iv. Bk. II. Ch. II. § 1.

(*i*) *Fox v. Fisher*, 3 B. & A. 135; *Kitchen v. Ibbetson*, L. R. 17 Eq. 46; *Re Thomas*, 1 Phil. O. O. 159. It is to be observed that under the Bankruptcy Act, 1883, s. 44 (2), now Bankruptcy Act, 1914, s. 38 (2) (c), reputed ownership is limited to goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent or permission of the true owner. It must be noticed that things in action, other than debts due, or growing due, to the bankrupt in the course of his trade or business, are not "goods" within the meaning of this section.

(*k*) *Re Fisher & Sons*, [1912] 2 K. B. 491.

(*l*) 1 Cr. M. & R. 405.

bankrupt
executor
residuary
legatee.

the bankrupt, or will, if necessary, appoint a receiver (*m*). Where a bankrupt is an executor and residuary legatee, and has paid the debts and particular legacies out of part of the assets, if he refuses to collect the rest, notwithstanding the trustee in bankruptcy has not the legal interest vested in him, the Court will assist him to get in the remainder in the name of the executor (*n*).

The goods of
the testator
cannot be
taken in
execution for
the debt of
the executor.

Again, the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right (*o*). So if an executor dies indebted, leaving to his executor goods which he had as executor, these are not assets liable to the payment of his debts, but only for the payment of the first testator's (*p*). But when an executrix used the goods of her testator as her own, and afterwards married and then treated them as the property of her husband, it was

(*m*) As to the powers exerciseable by the Court as regards a trustee in bankruptcy, see the cases of *Ex parte James*, L. R. 9 Ch. 609, and *Ex parte Simmons*, 16 Q. B. D. 308.

(*n*) *Ex parte Butler*, 1 Atk. 213.

(*o*) *Farr v. Newman*, 4 T. R. 621, where all the former authorities are collected and discussed. In this case, Buller, J., dissented from the rest of the Court, viz., Lord Kenyon, and Ashurst and Grose, Justices. The action was against the sheriff for a false return, and the question was, whether certain goods of the testator, which had been seized by the sheriff under an execution against the husband of the executrix, in a house in which the husband and wife resided, and the testator had resided, *but which had not been sold* under the execution, were bound by it. In a previous case, *Whale v. Booth*, B. R. 25 Geo. III. 4 T. R. 625, note (*a*), where the goods of the testator *had actually been sold* under a *fieri facias* against the executor for his own debt, and the executor joined in a bill of sale, it was held by the Court of King's Bench that the property passed by the execution, and could not afterwards be seized under a writ sued out by a creditor of the testator; upon the principle that the sale under the execution could not be distinguished from an alienation by the executor. But although the two cases may thus in some degree be reconciled, Eyre, C. J., in *Quack v. Staines*, 1 Bos. & Pul. 295, considers them as entirely conflicting, and the law as still unsettled. See also the observations of Sir Thomas Plumer, V.-C., in *Ray v. Ray*, Coop. 267. However, Lord Eldon, C., in *M'Leod v. Drummond*, 17 Ves. 168, adverts to *Farr v. Newman*, as having decided absolutely that the effects of the testator cannot be taken in execution for the debt of the executor, and expresses his satisfaction with that decision. See also *Kinderley v. Jervis*, 22 Beav. 23, *per* Romilly, M. R. See *post*, Pt. III. Bk. I. Ch. I., as to the power of an executor to dispose by sale of the goods of his testator. If an executor, in pursuance of the directions in the testator's Will, carries on the testator's business and in so doing contracts debts, the fact that he has carried on the business in his own name, and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets: *Re Morgan*, 18 C. D. 93; see *Jennings v. Mather*, [1902] 1 K. B. 1.

(*p*) Wentw. Off. Ex. 194, 14th edit.

held, that she could not be allowed to object to their being taken in execution for her husband's debt: for where an executrix or her husband have converted the goods, it does not lie in the mouth of either of them to say they are not the property of the husband, in a case between the executrix and one of his creditors (*q*). So after a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution property of the testator which is assets in equity (*r*). However, where goods of an intestate had been taken possession of, and used by an administrator, in the house of the intestate, for three months after the death of the intestate, Lord Tenterden held that they could not be taken in execution for the administrator's own debt, the time, in this case, not being sufficient to make the goods the administrator's property (*s*).

With reference also to the principle, that an executor or administrator holds the property of the deceased *in auter droit* merely, it has been laid down, that in respect to land, no merger can take place of the estate held by a man as executor in that which he holds in his own right (*t*). However, in the former editions of this Work the authorities were referred to at length in support of an important distinction, apparently well sustained, between the cases in which either of the two estates was an accession to the other by *act of law*, when no merger would take place, and those where the accession was by *act of the party*, when the less estate would merge.

With respect to assets the distinction was considered immaterial. In case of purchase, as of descent, all, says L. C. B.

(*q*) *Quick v. Staines*, 1 Bos. & Pul. 293.

(*r*) *Ray v. Ray*, Coop. Chanc. Cas. 264. Upon this case in his judgment in *Re Morgan*, 18 C. D. 93, 101, Fry, J., remarks that "the Court thought the circumstances were such as to raise an inference of a gift by the testator's creditor to the executor."

(*s*) *Gaskell v. Marshall*, 1 Mood. & Rob. 132; *S. C.*, 5 C. & P. 31. The learned judge, upon *Quick v. Staines* being cited, observed that the marriage in that case made all the difference.

(*t*) 2 Black. Comm. 177; *Jones v. Davies*, 5 H. & N. 767; *Chambers v. Kingham*, 10 C. D. 743; *Re Radcliffe*, [1892] 1 Ch. 227, 231. The Courts of Equity had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place. A Court of Equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold, per Cozens-Hardy, L. J., in *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 652, 653; but see *Manks v. Whiteley*, [1912] 1 Ch. 735, where it was said that some indication of intention is necessary.

Gilbert, agree that the term would not be extinct as to creditors. And it would seem that in no case would the term held by an executor or administrator merge in equity; for mergers are odious in equity and never allowed unless for special reasons.

Judicature
Act, 1873,
s. 25,
sub-s. 4.

Now by the Judicature Act, 1873, s. 25, sub-sect. 4, it is enacted that "there shall not after the commencement of this Act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." And sub-sect. 11 provides that "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail."

It may be observed in this place, with respect to the continuance of the privilege from merger, that, though a person is originally entitled to a term, or to an estate of freehold, as an executor or administrator, yet in process of time he may become the owner of that estate in his own right (*x*). This happens in the case of executors when the executor is also residuary legatee, and he performs all the purposes of the Will, and holds the estate as legatee, or pays money of his own, to the value of the term, in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu of the money. And in the case of administrators, when the administrator is the only person entitled to the beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid: Under these, and the like, circumstances the executor or administrator will have the estate in his own right; and when he has the estate in his own right, it will be subject to merger (*y*).

Generally speaking, it is difficult to ascertain when the character of executor or administrator ceases, and the ownership, independent of that character, commences. Every case must depend on its own circumstances. This only is certain, that when the executor or administrator ceases to hold the estate in that character, he will hold the same in his own right, and it will be subject to merger (*z*).

(*x*) See *post*, p. 491 *et seq.*

(*y*) 3 Preston on Conv. 310, 311; *Re French-Brewster*, [1904] 1 Ch. 713.

(*z*) *Ibid.*

Since no man can bequeath any thing but what he has to his own use, an executor cannot by his Will dispose of any of the goods which he has as executor to a legatee (*a*): although we have seen (*b*) that if an executor appoint an executor, the goods will pass to him as the representative of the first testator; while on the other hand, an administrator cannot transmit any interest in the property of the intestate to his own personal representative.

An executor cannot bequeath the goods of his testator to a legatee:

But, generally speaking, an executor or administrator, in his own lifetime, may dispose of and alien the assets of the testator: he has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased (*c*). This rule, however, is subject to some qualifications, which will be pointed out when this Treatise arrives at the general discussion of the power of executors and administrators (*d*).

but an executor in his lifetime may alien the assets, and they cannot be followed.

With reference to the possession *in auter droit*, it has been held, that if an executor or administrator grant *omnia bona sua*, the goods of the deceased will not pass, unless the grantor have no goods but as executor or administrator (*e*). So if an executor releases all actions, suits and demands whatsoever, which he had for any cause whatever, this extends only to such as he has in his own right, and not to such as he hath as executor (*f*).

Grant of *omnia bona sua* by an executor:

release of all demands.

Since the passing of the Married Women's Property Act, 1882, a married woman can act as executrix or administratrix as if she were a *feme sole* without the control of her husband: the husband, therefore, of an executrix or administratrix has since that Act no power of disposition over the personal estate so vested in his wife, nor is his concurrence in the conveyance of real and chattel real property now necessary (*g*).

Since the Married Women's Property Act, 1882, no control of husband over his wife, if executrix or administratrix.

With respect to the Poor Laws, it may be here observed, that an executor or administrator will gain a settlement by estate by

When an executor, &c. will gain a

(*a*) *Bransby v. Grantham*, 2 Plowd. 525; Godolph. Pt. 2, c. 17, s. 3.

(*b*) *Ante*, p. 174.

(*c*) By Lord Mansfield, in *Whale v. Booth*, 4 T. R. 625, note to *Farr v. Newman*.

(*d*) See *post*, Pt. III. Bk. I. Ch. I.

(*e*) *Hutchinson v. Savage*, 2 Lord Raym. 1307; Wentw. Off. Ex. 193, 14th edit. But an executor may have trespass for taking goods in his time, *quare bona et catalla sua*, because of the possession: by Holt, C. J., in *Knight v. Cole*, 1 Show. 155.

(*f*) *Knight v. Cole*, 1 Show. 153.

(*g*) 7 Edw. VII. c. 18, s. 1, *ante*, p. 155.

settlement by residing on the leasehold of the testator, &c.

a residence as such upon a leasehold property of the deceased (*h*). And a settlement will equally be gained, although the tenement to which he comes as executor or administrator be under the value of 10*l.* a year (*i*). So it was held, that the husband of an administratrix, entitled to the trust only of a term, gained a settlement by residence thereon for forty days (*k*). And the executor to a tenant of an estate under 10*l.* a year gains a settlement by forty days' residence, although he does not prove the Will; because the property vests in him from the death of the testator (*l*): but a next of kin of a lessee for years, in a case where several are in equal degree of kindred, can gain no settlement by residing on the land, if he does not take out letters of administration; because no right is vested in him till that is done (*m*). Yet in the case of a *sole* next of kin, exclusively entitled to the administration of the personal estate, who had resided more than forty days in the parish in which a leasehold tenement belonging to the intestate lay, it was held, that she thereby gained a settlement, although she had not then obtained a grant of the administration; upon the ground that the exclusive right to enforce the proper means of acquiring the legal title to the property, coupled with the actual enjoyment of it, gave so much colour of right to reside, as to exempt such residence from being considered a vagrant intrusion into a parish in which the party has nothing of *his own*, within the purview and scope of the Poor Laws (*n*).

3 & 4 W. IV. c. 74. Executor not to be protector.

By stat. 3 & 4 Wm. IV. c. 74 (*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance*), s. 27, it is provided and enacted, "that no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement."

(*h*) *Rex v. Sundrish*, Burr. Sess. Ca. 7.

(*i*) *Rex v. Uttoxeter*, Burr. Sess. Ca. 538. Even though the letters be taken out for a pauper administrator by parish officers, on purpose to create the settlement: *Rex v. Great Glenn*, 5 B. & Adol. 188.

(*k*) *Mursley v. Grandborough*, 1 Stra. 97.

(*l*) *Rex v. Stone*, 6 T. R. 295.

(*m*) *Rex v. Barnard Castle*, 2 A. & E. 108.

(*n*) *Rex v. Horsley*, 8 East, 405. A grant of administration will not operate by relation so as to vest a term in the administrator from the death of the intestate, and thus make a person irremovable for a time past, who during that time was removable: *Ibid.* 409; and see also *Rex v. Widworthy*, Burr. Sess. Ca. 109.

It may be proper to conclude these doctrines as to the difference between the interest which an executor or administrator has in the goods of the deceased, and such as a man has in his own proper goods, by considering more fully a subject to which there has already been occasion to advert (*o*), viz., how the property which the executor or administrator has at first in his representative character, may become his own to his own use, as his other goods which he has not as executor or administrator (*p*).

How the effects which an executor takes as such may become his own.

And first, in regard to the ready money left by the testator; on its coming into the hands of the executor, the property in the specific coin was of necessity altered, as soon as it ceased to be kept separate, as in a separate bag or box, or unmixed with other moneys, or passed into currency (*q*), and therefore where the specific coin is intermixed with the executor's own money a creditor of the testator cannot, by *fieri facias* on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution (*r*). In equity, however, the money can be followed so long as the money, or that which represents it, is not wholly spent or dissipated so that nothing remains that could be subject to the trust or fiduciary duty (*s*).

It is said in Toller, that if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election shall become his own (*t*); and that if by such election he acquire the absolute ownership of the chattel, and die, his executor may defend himself in an action of *detinue* brought for the same by the surviving executor of the first testator: and there are dicta in the older cases that if an executor pays with his own money the debts of the testator in such

(*o*) *Ante*, pp. 487, 488.

(*p*) Wentw. Off. Ex. c. 7, p. 197, 14th edit.

(*q*) *Taylor v. Plumer*, 3 M. & S. 562.

(*r*) Wentw. Off. Ex. c. 7, p. 196, 14th edit.; Toller, 238.

(*s*) *Re Hallett's Estate*, 13 C. D. 696, 719. And see *Mutton v. Peat*, [1900] 2 Ch. 79; *Re Hallett & Co.*, [1894] 2 Q. B. 237. And now by the Judicature Act it is provided that where there is a difference between the principles of law and equity those of equity are to prevail; and it would therefore seem that the creditor would be entitled to have the judgment debt satisfied out of such intermixed moneys to the amount of the testator's money: *Re Hallett's Estate*, 13 C. D. 696, 711, 712.

(*t*) Toller, 239; Wentw. Off. Ex. c. 7, pp. 196, 199, 14th edit.; *Elliot v. Kemp*, 7 M. & W. 313, per Parke, B.

order as the law appoints, to the value of the whole of the personal assets, he acquires an absolute right to them; and he may dispose of them as he pleases, without being guilty of any *devastavit*(*u*). But in the case of *Hearn v. Wells* (*x*), Knight Bruce, V.C., said he could not accede to the proposition that an executor has a right in equity to acquire as a purchaser an absolute title to specific chattels by intending so to deal with them and by paying the testator's debts to an amount exceeding the value of those chattels; and that whatever might be the rule of law upon a plea of *plene administravit*, he apprehended that not to be the rule in equity; and he did not agree that the executor had in such circumstances an absolute right to the property (*y*). And it would seem that now, by reason of the provisions of the Judicature Act, the rule in equity would prevail. In *Re Gilbert* (*z*), where the debt due to the executor of an insolvent testator exceeded the value of the testator's assets, Wright, J., held that the executor was not bound to realize the assets, *i.e.*, convert them into money, before exercising his right of retainer, but was entitled to retain the assets in specie in satisfaction of his debt.

It is said in the old text-books that if the testator's goods be sold under a *fieri facias*, the executor, as well as any other person, may buy such goods of the sheriff; and in case he does so, the property which was vested in him as executor shall be turned into a property *in jure proprio* (*a*).

If the executor among the testator's goods find and take some which were not the testator's, and the owner recover damages for them in an action of trespass or trover, and the judgment is followed by satisfaction, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them (*b*).

If an executor or administrator makes an underlease of a term of years of the deceased, rendering rent to himself, his executors, &c., though he has the term wholly in right of the

(*u*) *Merchant v. Driver*, 1 Saund. 307; *Chalmer v. Bradley*, 1 Jac. & Walk. 64; *Vanquelin v. Bouard*, 15 C. B. N. S. 341, 372.

(*x*) 1 Coll. 333.

(*y*) See further the observations of Lindley, M. R., in *Re Rhoades*, [1899] 2 Q. B. 347, 352.

(*z*) [1898] 1 Q. B. 282, approved by C. A. in *Re Rhoades*, *ubi supra*; *Re Broad*, 105 L. T. 719.

(*a*) Wentw. Off. Ex. c. 7, p. 200, 14th edit.; Toller, 239.

(*b*) Wentw. Off. Ex. c. 7, p. 200, 14th edit.; Toller, 239; *Brinsmead v. Harrison*, L. R. 6 C. P. 584; L. R. 7 C. P. 547; *Ex parte Drake*, *In re Ware*, 5 C. D. 866.

intestate, yet, if he dies, the rent will at law be payable to his personal representative, and not to the administrator *de bonis non* of the original deceased (*c*); but the rents reserved in such leases are assets of the testator, and are applicable in due course of administration (*d*).

As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee (*e*), so an administrator, who is also entitled to share in the residue as one of the next of kin under the Statute of Distributions, may acquire a legal title, in his own right, to goods of the deceased, by taking them by an agreement with the parties entitled to share with himself under the statute (*f*).

If one of several executors or administrators alone sell any of the goods of the testator, he alone may maintain an action for the price, not naming himself executor (*g*).

In a case where bills of exchange had been accepted by A., for the accommodation of B., one of the executors of C., it appeared that B., having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in his possession, discounted the bills with such money, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box: And it was held, by Alexander, C. B., that B. could not sever his character of an accommodation holder of these bills from his character of executor, so as to enable him and his co-executor to sue as indorsees of the bills for a valuable consideration (*h*).

(*c*) *Drue (or Drew) v. Baylie*, 1 Freem. 403; 2 Lev. 100; *Norton v. Harvey*, 1 Ventr. 259; *Cowell v. Watts*, 6 East, 405. See, however, *Catherwood v. Chabaud*, 1 B. & C. 150; *post*, Pt. II. Bk. IV. Ch. II.

(*d*) Bac. Abr. Leases, I. 7.

(*e*) See *post*, Pt. III. Bk. III. Ch. IV. § III.

(*f*) In *Elliott v. Kemp*, 7 M. & W. 306, the question was whether certain chattels, which were formerly the husband's, became, by any means, his widow's in her own right; and Parke, B., at p. 313, is reported to have said:—"The administratrix might have acquired a title by payment of the debts of the intestate to an equal value with the chattels, or by taking those chattels, by an agreement with the next of kin intitled under the Statute of Distribution, or even without such agreement, by appropriating them to herself as her own share." It is, however, submitted that an administrator cannot, except by agreement with the other persons entitled to share, either expressed or implied, appropriate to himself chattels as his own share, since that would in effect be constituting himself a purchaser thereof from himself, which the law does not allow. As to appropriation in satisfaction of a legacy or share in residue, see *post*, Pt. III. Bk. III. Ch. V. s. I.

(*g*) *Godolph. Pt. 2, c. 16, s. 1*; *Wentw. Off. Ex. 224*, 14th edit.; *Brassington v. Ault*, 2 Bing. 177; *S. C.* 9 Moo. 340.

(*h*) — *v. Adams*, 1 Younge, 117.

BOOK THE SECOND.

THE QUANTITY OF THE ESTATE IN POSSESSION OF AN EXECUTOR
OR ADMINISTRATOR.

The estate of an administrator is the same as that of an executor.

AFTER the administration is granted, the interest of the administrator in the property of the deceased is equal to and with the interest of an executor (*a*). Executors and administrators differ in little else than in the manner of their constitution (*b*).

The whole personal estate of the deceased vests in the executor: and real estate, since Land Transfer Act, 1897.

The general rule is, that all goods and chattels, real and personal, go to the executor or administrator (*c*). By the laws of this realm, says Swinburne (*d*), as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to deal with the lands, tenements, and hereditaments. In other words it may be stated, that, both at law and equity, the whole personal estate of the deceased vests in the executor or administrator: and now in the case of deaths after the 31st of December, 1897, that is, after the commencement of the Land Transfer Act, 1897, the whole real estate also (including real estate over which the deceased has exercised a general power of appointment), other than and except copyholds and customary freeholds, where admission or any act of the lord of the manor is required to perfect the title of a purchaser from the customary tenant (*e*), but including equitable estates or interests in copyholds (*f*), vests in the personal representative.

The person clothed with the character of administrator is the legal personal representative of the deceased, unless and

(*a*) Touchs. 474; *Blackborough v. Davis*, 1 P. Wms. 43, by Holt, C.J.

(*b*) Treat. Eq. Bk. 4, Pt. 2, c. 1, s. 1.

(*c*) Com. Dig. Biens (C); Co. Lit. 388, *a*. The *hæres* of the civil law, answering to our executor or administrator, succeeded in *universum jus defuncti*; Godolph. Pt. 2, c. 1, s. 1.

(*d*) Swinb. Pt. 6, s. 3, pl. 5.

(*e*) Land Transfer Act, 1897, s. 1 (4).

(*f*) *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

until the grant is revoked or determined, with power to dispose of the deceased's assets including real estate (*g*).

The personal property in which the deceased had but a joint estate or possession will survive to his companions, and his executor or administrator will not be entitled to a moiety of it (*h*): for a survivorship holds place regularly as well between joint tenants of goods and chattels in possession or in right, as between joint tenants of inheritance or freehold (*i*).

Personal property of which the deceased was joint tenant shall not go to the executor:

But the wares, merchandise, debts or duties which joint merchants have, as joint merchants or partners, shall not survive, but shall go to the executors of the deceased; and this is *per legem mercatoriam* which is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (*j*). And this part of the *lex mercatoria* has been extended to all traders (including manufacturers) (*k*), and as it would seem, to all persons engaged in joint undertakings in the nature of trade (*l*). Thus, if two take a lease of a farm jointly, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive (*m*). So where two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies; when the money is paid the survivor shall not have the whole, but the representative of

except in the cases of partners in trade, &c.

(*g*) *Hewson v. Shelley*, [1914] 2 Ch. 13.

(*h*) Swinb. Pt. 3, s. 6, pl. 1. See *post*, Pt. III. Bk. III. Ch. v. § 1., as to what constitutes a joint tenancy.

(*i*) Co. Lit. 182, a; *Harris v. Fergusson*, 16 Sim. 308; *Crossfield v. Such*, 8 Exch. 825.

(*j*) *Ibid.*; *Rex v. Collectors of Customs*, 2 M. & S. 225. But with respect to *choses in action*, though the *right* of the deceased joint tenant devolves on his personal representative, the *remedy* survives to his companion, who alone must enforce the right by action: see *post*, Pt. II. Bk. III. Ch. i. § II.; Pt. v. Bk. i. Ch. i. And it has been doubted whether the rule can in any case be enforced but in a Court of Equity. But it was decided by the Court of Exchequer, after full consideration, that the title to partnership chattels does not survive at law: *Buckley v. Barber*, 6 Exch. 164. The surviving partner can realise the assets by sale or otherwise for the purpose of paying partnership debts whether incurred before or after the dissolution. The lien of the executors of the deceased partner is not a lien on any specific property so as to fetter its realisation, but a lien or claim on the surplus assets after realisation. As soon as you get your surplus, the lien attaches: *Re Bourne, B. v. B.*, [1906] 2 Ch. 427.

(*k*) *Buckley v. Barber*, 6 Exch. 164.

(*l*) *Hamond v. Jethro*, 2 Brownl. & Gold. 99.

(*m*) *Jeffereys v. Small*, 1 Vern. 217.

him who is dead shall have his proportion (*n*). So if two or more make a joint purchase of land, and afterwards one of them lays out a considerable sum in repairs and improvements and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it (*o*). But where two become joint tenants, or jointly interested, in personal property, by way of gift, there the same shall be subject to all the consequences of the law of survivorship (*p*).

In the case of *Morris v. Barrett* (*q*), the residue of real and

(*n*) Fonbl. Treat. B. 2, c. 4, s. 2, note (*g*); *Vickers v. Cowell*, 1 Beav. 529. For though a joint debt belongs at law to the survivor, yet in equity the presumption is that money advanced by two or more persons is owned by them in separate shares and not jointly; and therefore a declaration in the mortgage deed or obligation that the money advanced was money belonging to them on a joint account in equity as well as at law, and that the receipt of the survivor should be a complete discharge, was in many cases necessary prior to the Conveyancing Act, 1881. This declaration, as between the lenders and the borrower, was required to rebut the equitable presumption that the money was not a joint advance, and as a contract, that a severance of the joint tenancy, even if there had been one, should not affect the right of the survivor to give a discharge, so that the money might be paid without any inquiry as to whether there had been any severance. Now, by sect. 61 of the Conveyancing Act, 1881, it is provided—(1.) “Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one jointly, and not in shares, the mortgage money, or other money, or money’s worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money’s worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor, shall be a complete discharge for all money or money’s worth for the time being due, notwithstanding any notice to the payer of the severance of the joint account. (2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation or transfer, and shall have effect subject to the terms of the mortgage, obligation or transfer, and the provisions therein contained. (3.) This section applies only to a mortgage, or obligation or transfer made after the commencement of this Act.”

(*o*) *Lake v. Gibson*, 1 Eq. Cas. Abr. 291, pl. 3. See further *Harrison v. Barton*, 1 Johns. & H. 287, where, on the purchase by two persons contributing equally to the costs of it, Wood, V.-C., held that parol evidence of surrounding circumstances and of subsequent dealings was admissible, notwithstanding the Statute of Frauds, to prove an intention to hold in severalty: and his Honour relied on the observation of Sir W. Grant, in *Aveling v. Knipe*, 19 Ves. 441, that equity will not hold a purchase joint, if there are any circumstances from which it can be collected that a joint tenancy was not contemplated.

(*p*) 1 Vern. 217; *post*, Pt. III. Bk. III. Ch. v. § 1.

(*q*) 3 Younge & Jerv. 384. And see *Steward v. Blakeway*, 4 Ch.

personal estates was devised by a testator to his two sons as joint tenants; and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other; it was held, under the circumstances, that they continued, till the death of one of them, joint tenants of all the property that passed by the Will of their father, but were tenants in common of the after-purchased estates.

The general rule of law (except in the case of limited partnerships) is, that on the death of one of several partners, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of, and if the surviving partners continue the trade, the representative of the deceased partner may elect to take his share of the profits, or may charge the survivors with interest on the amount of capital retained and used by them. If the property of the partnership consists in part of leaseholds, and the survivors renew the lease, they are considered to do so for the benefit of the partnership (*r*).

Rights of executor of one of several partners.

In some instances the title which the deceased had in respect of a special property only in goods is transmissible to his personal representative. Thus if an uncertificated bankrupt had acquired goods after his bankruptcy and died possessed of them, having been allowed to retain possession by the assignees, his executor or administrator might recover them from a stranger; for there was a good title in the bankrupt as against all the world but the assignees, and this title passed to his personal representative(s). But it would seem that the bare circumstance of the deceased having died in possession of goods will not give his executor or administrator a title to them even against a mere

In what cases the title goes to the executor, where the deceased had only a special property.

603, where a distinction is drawn between partnership and part ownership in lands purchased with the undivided profits of a quarry.

(*r*) *Clements v. Hall*, 2 De G. & J. 173, 186; *Townend v. Townend*, 1 Giff. 201; *Wedderburn v. Wedderburn*, 22 Beav. 84, 86. As to the proper mode of taking the partnership accounts of bankers, as between a surviving partner and the estate of a deceased partner, see *Bate v. Robins*, 32 Beav. 73. And see now Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 29, 33, 38, 39, 42, 43.

(*s*) *Fyson v. Chambers*, 9 M. & W. 460; *ante*, p. 482. See also *Morgan v. Knight*, 15 C. B. N. S. 669.

wrongdoer, if it can be shown that, in truth, the title is elsewhere (*t*).

In the case of *Re Cousins* (*u*), where a testator by his Will gave to his son the option, upon the death of the survivor of the testator's widow and sister, to purchase an hotel at a given price, and before the death of such survivor the son died, also leaving a Will and appointing executors, it was held that, according to the true meaning of the Will of the testator, the option to purchase the hotel was a right personal to the son, and could not be exercised after his death by his executors.

An executor may be seised of real property as trustee :

rule that you must find intention of testator from the whole Will taken together :

As regards deaths before the commencement of the Land Transfer Act, 1897, besides the interest which an executor or administrator in all cases takes in the whole personal estate of the testator or intestate, he may in some instances be seised of real property of the deceased as trustee, or be *ex officio* invested with a power of disposing of it. The rule is that you must find out the intention of the testator from the whole Will taken together, and, if it appears on the whole construction that you cannot give effect to the Will, unless you give the executors a legal estate, then you must hold that they have the legal estate. Therefore, where a testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his wife and his four daughters to be equally divided between them: provided as follows, that the share of his wife should be divided after her death between his four daughters, or the survivors and their children: and the testator appointed his wife and another executors to act jointly in carrying out all the intentions of his Will, and to invest his daughters' shares for their benefit and the benefit of their children; it was held upon an application under the Vendor and Purchaser Act, that the legal estate in freeholds was vested in the executors, who could make a good title to a purchaser (*x*). It has been a

(*t*) *Elliott v. Kemp*, 7 M. & W. 306; *ante*, p. 482.

(*u*) 30 C. D. 203; cf. *Belshaw v. Rollins*, [1904] 1 Ir. R. 284, where a similar option was held exercisable by the executor of the person to whom the option was given.

(*x*) *Davies to Jones*, 24 C. D. 190. In *Anthony v. Rees*, 2 Cr. & J. 75, Bayley, B., in his judgment says, "when trustees are directed to do anything for the performance of which the legal estate is requisite they are to have the legal estate." *Sissons v. Chichester-Constable*, [1916] 2 Ch. 75.

subject of some discussion in what cases executors take a fee simple, in trust to sell, under a Will, or are invested merely with a power of disposition. The distinction resulting from the authorities appears to be this: that a devise of the land to *executors to sell* passes the interest in it; but a devise that *executors shall sell the land*, or that *lands shall be sold by the executors*, gives them but a power (*y*). An eminent writer has concluded from an examination of all the cases, that even a devise of *land to be sold by the executors*, without giving the estate to them, will invest them with a power only, and not give them an interest (*z*).

in what cases
executors
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disposition :

It sometimes happens that a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, *if the proceeds be distributable by the executor*, he shall have the power by implication. Thus, a power in a Will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies (*a*); and it seems, that whilst the chain remains unbroken, the power, until exercised, will go from him to his executors (*b*).

executors
shall have a
power to sell
land by
implication,
where the
proceeds are
distributable
by them :

(*y*) The cases will be found in Sugden on Powers, 8th edit. 111 *et seq.* See also *Doe v. Shotter*, 8 A. & E. 905, accord.

(*z*) Sug. on Pow. 8th edit. 114. But see, on this subject, Co. Lit. 113, *a*, and Mr. Hargrave's note, where that learned person inclines to construe a devise that executors shall sell the land, as well as a devise of lands to be sold by executors, as investing them with a fee simple, and not merely a power. Powell on Devises, vol. 1, pp. 245 *et seq.*, 3rd edit., takes the same view of the question as Sir Edw. Sugden. In *Knocker v. Bunbury*, 6 Bing. N. C. 306, a testator possessed of real and personal property desired his executors, out of such moneys of his as might come to their hands, to purchase two annuities for A. W. and her children: And with regard to the rest of his property, of what kind soever, he desired his executors, after payment of his debts and funeral expenses, to pay and make over the whole to his daughter, and to the children of the said daughter after her decease: The Court of Common Pleas were of opinion that the executors took no interest in the freehold property: but that they had a power to settle it upon the daughter for life, with remainder after her decease to her children and their heirs.

(*a*) Sug. on Pow. 8th edit. 118, where the cases are collected; *Sissons v. Chichester-Constable*, [1916] 2 Ch. 75. See also 2 Preston on Abstracts, 264; *Curtis v. Fulbrook*, 8 Hare, 278 (correcting the report of *S. C.* 8 Hare, 25): And if the produce of the real estate is blended with the personal estate, the power to sell will vest in the executors by implication: *Tylden v. Hyde*, 2 Sim. & Stu. 238. See also *Forbes v. Peacock*, 11 Sim. 152; 12 Sim. 523; 11 M. & W. 630; *Gosling v. Carter*, 1 Coll. 644; *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Wrigley v. Sykes*, Rolls, 22 Jan. 1856, 2 Jur. (N. S.) 78.

(*b*) Sug. on Pow. 8th edit. 118. So it may be exercised by the

seems, where the management of the fund is not given to them:

But in *Bentham v. Wiltshire(c)*, where a testator bequeathed an estate to his wife for life, and directed that after her decease the estate should be sold to the highest bidder by public auction, and the money arising from such sale be disposed of among certain persons named in his Will, and he appointed his wife and another person executors; it was held, that the power was not given by implication to the executors; because they had nothing to do with the produce of the sale, nor any power of distribution with respect to it (*d*). In this case the Vice-Chancellor (Leach) said: "To enable executors to sell, the power must either be expressly given to them, or necessarily to be implied, from the produce being to pass through their hands in the execution of their office, as in the payment of debts and legacies."

whether a mere charge of debts on land gives the executors an implied power of sale:

Before the case of *Doe v. Hughes (e)*, the law had, it appears, been considered to be that the effect of a charge of the real estate with debts *simpliciter* was to give the executors an implied power of sale (*f*), but in that case the Barons of the Exchequer deliberately denied this proposition (*g*).

survivor of two or more executors: *Forbes v. Peacock*, 11 M. & W. 630. Where a testator directs that his debts shall be paid by his executors thereafter named, and in case his personal estate should be insufficient charges his real estate with the deficiency, an administrator *test. annex.* has no power to sell the real estate either under the terms of the Will or by virtue of 22 & 23 Vict. c. 35, s. 15: *Re Clay and Tetley*, 16 C. D. 3.

(*c*) 4 Madd. 44.

(*d*) See also *Patton v. Randall*, 1 Jac. & Walk. 189; 1 Sug. on Pow. 138, 139, 6th edit.; *Allum v. Fryer*, 3 Q. B. 442, 446. But the authority of *Bentham v. Wiltshire* was doubted by Shadwell, V.-C., in *Forbes v. Peacock*, 11 Sim. 152, 12 Sim. 528; and his Honour said (12 Sim. 536), that he did not think Sir John Leach would have decided as he did in that case if he had seen the case of *Ward v. Devon*, which was decided by Sir W. Grant (11 Sim. 160). See, however, *Haydon v. Wood*, 8 Hare, 279, note (*a*), and *Curtis v. Fulbrook*, *ibid.* 278 (correcting the report, *ibid.* 25).

(*e*) 6 Exch. 223; and see Sug. on Pow. 8th edit. 122.

(*f*) See 17 Beav. 601, by Romilly, M. R.

(*g*) In *Hodkinson v. Quinn*, 1 Johns. & H. 309, it was assumed by Wood, V.-C., that where there is a general charge of debts, and no distinct provision as to the person by whom the sale is to be made, then the executors take an implied power to sell for the payment of debts. See also *Wrigley v. Sykes*, 21 Beav. 337; *Sabin v. Heape*, 27 Beav. 553; *Cook v. Dawson*, 29 Beav. 123, 126. See also *S. C.* on appeal, 3 De G. F. & J. 127. But see also *ibid.* 128, by Lord Justice Knight Bruce. But an exception, it seems, prevails where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, for that in such case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor: *Cook v. Dawson*, 29 Beav. 126, 127;

With respect to all Wills which have come into operation after 13th August, 1859, the power to sell is expressly conferred on executors by sect. 16 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), where the testator has charged his real estate with the payment of his debts or legacies, and has not devised the hereditaments so charged in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees (*h*).

Charge of debts or legacies on real estate not devised to trustees gives executors power of sale.
22 & 23 Vict. c. 35, s. 16.

Now, by virtue of the Land Transfer Act, 1897 (sect. 1 (1)), in cases of death after the 31st Dec., 1897, real estate (except land of copyhold tenure or customary freehold as mentioned in sub-s. 4) vests in the personal representatives, and sect. 2 (2) provides that the powers, rights, duties, and liabilities of personal representatives in respect of personal estate shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate (*i*).

60 & 61 Vict. c. 65.

Even without a charge, express or implied, executors can make a good title to leaseholds, although specifically bequeathed,

3 De G. F. & J. 127; *Marshall v. Gingell*, 21 C. D. 790. So where the estate is devised to another charged with the payment of debts, the doctrine of implying a power in the executors does not apply; for there the money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title: *Colyer v. Finch*, 5 H. of L. 905; *Corser v. Cartwright*, L. R. 7 H. L. 731; *West of England Bank v. Murch*, 23 C. D. 138. See also *Hodkinson v. Quinn*, 1 Johns. & H. 303.

(*h*) See *Re Adam and Perry's Contract*, [1899] 1 Ch. 554. The powers conferred on executors by Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 16) do not apply to cases in which the executor has renounced and an administrator *test. annex.* has been appointed. The administrator who is not appointed by the testator, but is the officer of the Court, has no power to sell the real estate either under the terms of the Will or under the above Act: *Re Clay and Tetley*, 16 C. D. 3.

(*i*) It was held in *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58, that under this section executors who had proved the Will could not convey the legal fee simple without the concurrence of their co-executor who had not proved. But now by the Conveyancing Act, 1911, s. 12, a sale of real estate can be made by the proving executor or executors alone without the authority of the Court. In *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187, it was decided that where by his Will a testator appoints special executors as to property situate in a foreign country or in the Colonies, and by the same Will appoints other persons general executors of his Will, on a sale by the general executors of the testator's real estate in England a good title can be shown thereto without the concurrence of the special executors.

Whether
purchaser
entitled to
inquire
whether
debts remain
unpaid:
on sale of
real estate:

unless they have assented to the bequest: but the purchaser generally requires the concurrence of the specific legatee.

In the case of *Re Tanqueray Willaume and Landau* (*k*), the Court of Appeal held, that where executors in whom the legal estate is vested are selling real estates charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease, but intimated that after the lapse of twenty years a presumption arises that the debts have been paid, and the purchaser, therefore, in such latter case, is put upon inquiry; and there is no distinction in this respect between a devise to executors subject to a charge of debts, and a devise to them upon trust for the payment of debts.

on sale of
leaseholds.

This rule or presumption, however, does not in general apply to executors selling leaseholds of their testator (*l*). In his judgment in *Re Whistler* (*m*), Kay, J., said as follows: "I am not aware that the rule in *In re Tanqueray Willaume and Landau* at all extends to the power of an executor to deal with the personal property of the testator. The exercise by trustees of a mere power of sale, and the exercise by the executor of the right which the law gives him as executor to deal with assets vested in him in that character are two very different things, and unless I could find it so laid down by express authority, I should be very slow to say that after twenty years the Court must assume that an executor has lost his right to deal with the personal property of his testator. The suggestion is made, with which I entirely agree, that it is not merely the debts of the testator which the executor has to pay; he may have incurred expenses of administration, and he may have to raise money by pledge or mortgage of the personal property of the testator, and these are matters for which it is essential that

(*k*) 20 C. D. 465. The executor who is also devisee of an estate charged with the payment of debts may be presumed by a *bonâ fide* purchaser or mortgagee to be dealing with it for the purposes of the administration, and may give a valid title to it. Such purchaser or mortgagee therefore will not be bound to look to the application of the money. Mere absence of statement of the purpose for which the money is to be used will not make the purchaser or mortgagee liable: *Corser v. Cartwright*, L. R. 7 H. of L. 731. Nor is the purchaser liable to see to the application of the purchase-money even if it is expressed to be raised for the payment of legacies only: *Re Henson*, [1908] 2 Ch. 356.

(*l*) *Re Whistler*, 35 C. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101.

(*m*) 35 C. D. 565.

he should retain the power of dealing with the assets of the testator." The circumstance that an executor in a conveyance on sale did not purport to execute the deed as executor, and conveyed as beneficial owner, is not sufficient to raise the presumption that he was acting otherwise than in the discharge of his duties as executor (*n*). But if the nature of the transaction affords intrinsic evidence that the executor is not acting in the execution of his duty, the purchaser would not acquire a good title (*o*). An order granting administration is a judicial act, and even if it could be held void on the ground of want of jurisdiction, the title of a purchaser from the administrator would be protected under the Conveyancing Act, 1881, s. 70 (*p*).

As regards cases of testators dying since the commencement of the Land Transfer Act, 1897, unless and until there has been an assent by the personal representatives to the devise contained in the Will or a conveyance by them to the person beneficially entitled, real estate vesting in the personal representatives under the Act will stand on the same footing as chattels real.

Effect of
Land
Transfer Act,
1897, as to
real estate.

As to what words are sufficient to indicate an intention, that real estate devised to executors shall be held charged with the debts of the testator, by reason of a direction that the executors shall pay the testator's debts, it has been held that if there is a direction that the executors shall pay the testator's debts, followed by a gift of all his estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest as in *Henvell v. Whitaker*(*q*), or only a beneficial life interest as in *Finch v. Hattersley*(*r*), or no beneficial interest at all as in *Hartland v. Murrell*(*s*). But this rule seems only to apply, where the entirety of the liability has been thrown on the entirety of the estate (*t*). Generally

What is
sufficient
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debts.

(*n*) *Corser v. Cartwright*, L. R. 7 H. L. 731; *Re Venn and Furze's Contract*, *ubi supra*; *Re Henson*, [1908] 2 Ch. 356; and see *Re Verrell*, *infra*.

(*o*) *Watkins v. Cheek*, 2 S. & S. 199; *Colyer v. Finch*, 5 H. L. C. 905; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101, at p. 111, explaining *Re Molyneux and White*, 13 L. R. Ir. 382; 15 L. R. Ir. 383. And see *Re Verrell's Contract*, [1903] 1 Ch. 65; *Attenborough v. Solomon*, [1913] A. C. 76.

(*p*) *Hewson v. Shelley*, [1914] 2 Ch. 13.

(*q*) 3 Russ. 343.

(*r*) 3 Russ. 345, n.

(*s*) 27 Beav. 204.

(*t*) *Bailey v. Bailey*, 12 C. D. 268.

the intention must be collected from the whole Will (*u*), and it has been said that there is an exception from the general rule, where there are two or more executors to whom unequal benefits are given by the Will (*v*).

A testator cannot turn his real estate into legal personal assets by directing it to be sold.

It is here necessary to observe, that a testator cannot by a declaration in his Will alter the *legal* character of real property (*x*), and it may now be considered a settled rule, that where in the case of deaths before the commencement of the Land Transfer Act, 1897, lands are devised to executors, to be sold for the payment of debts and legacies, the money arising from the sale is to be considered equitable and not legal assets (*y*). The distinction between these two kinds of assets, and the consequences of that distinction, will be considered hereafter, with the subject of assets generally.

Doctrine of equitable conversion :

land considered as money, and money as land :

It is, however, an established doctrine in Courts of Equity, that things shall be considered as actually done, which ought to have been done: and it is with reference to this principle, that land is under some circumstances regarded as money, and money as land. It was laid down by Sir Thomas Sewell, M. R., in *Fletcher v. Ashburner* (*z*), "that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by Will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land" (*a*). It follows, therefore, that every person claiming property under an instrument directing its conversion must take it in the character which that

(*u*) *Wasse v. Heslington*, 3 My. & K. 495.

(*v*) *Harris v. Watkins*, Kay, 438; but see *Re Tanqueray-Willaume and Landau*, 20 C. D. 465.

(*x*) *Re Walker*, [1908] 2 Ch. 705.

(*y*) *Clay v. Willis*, 1 B. & C. 364; *Barker v. May*, 9 B. & C. 489.

(*z*) 1 Bro. C. C. 497.

(*a*) See *Weldale v. Partridge*, 5 Ves. 396, where Lord Alvanley remarks the accuracy of this statement of the doctrine. This doctrine does not extend to the interpretation of statutes imposing duties on personal estate: *Re De Lancey*, L. R. 4 Exch. 345, *per Kelly*, C. B. A discretionary trust for sale does not affect conversion until the discretion is exercised: *Re Newbold*, 110 L. T. 6.

instrument has impressed upon it; and its devolution and disposition will be governed by the rules applicable to that species of property (b).

Again, since equity looks upon things agreed to be done, as actually performed, it follows, that, when there is a valid contract for sale of real estate, the vendor is regarded in equity as a trustee for the purchaser of the estate sold (c), and the purchaser as a trustee of the purchase-money for the vendor (d). Hence, the death of the vendor or vendee before the conveyance, or

land contracted to be sold:

(b) 2 Powell Dev. 61, Jarman's edition. See also Sugden's Law of Property, 460; *In the goods of Gunn*, 9 P. D. 242. An absolute order for sale, made within the jurisdiction of the Court in an administration action, operates as a conversion from the date of the order and before any sale takes place: *Hyett v. Meekin*, 25 C. D. 735; *Burgess v. Booth*, [1908] 2 Ch. 648; *Fauntleroy v. Beebe*, [1911] 2 Ch. 257; and the same principle applies to an order for sale in a partition action: *Re Dodson*, [1908] 2 Ch. 638; *Herbert v. Herbert*, [1912] 2 Ch. 268; except with regard to persons under disability: *Re Norton*, [1900] 1 Ch. 101; *Hopkinson v. Richardson*, [1913] 1 Ch. 284. There is no equity for the Crown to call for a conversion of real property in order that it may take the produce of it: *Taylor v. Haygarth*, 14 Sim. 8; *Henchman v. Att.-Gen.*, 3 M. & K. 485. It should be further observed that though a new character may, by this doctrine of equitable conversion, have been impressed upon the property, yet it is in the power of any person (not personally incompetent) who is entitled to it absolutely, to elect to take it in its actual state: *Mutlow v. Bigg*, 1 C. D. 385; *Re Gordon*, 6 C. D. 531; *Meek v. Devenish*, *ibid.* 566; *Re Davidson*, 11 C. D. 341. But those electing must be absolutely entitled; if they have only a share or a defeasible interest in the proceeds of the sale they cannot effect a conversion: *Sisson v. Giles*, 32 L. J. Ch. 606; *Douglas v. Powell*, [1902] 2 Ch. 296; *Re Horsnail*, [1909] 1 Ch. 631. Slight circumstances, and even parol declarations of such an intention, will be sufficient for this election: see 1 Roper on Leg. 473, 3rd edit.; *Matson v. Swift*, 8 Beav. 375, *per* Lord Langdale, M. R.; but they must be unequivocal. Changing the security of the money to be laid out in land was held to effectuate the purpose: *Lingen v. Sowray*, 1 P. Wms. 172; bequeathing it as personalty: *Triquet v. Thornton*, 13 Ves. 345; also making a lease of the estate directed to be sold: *Crabtree v. Bramble*, 3 Atk. 680. Preserving the property in its actual state may be sufficient: *Dixon v. Gayfere*, 17 Beav. 433; *Mutlow v. Bigg*, 1 C. D. 385; *Re Gordon*, 6 C. D. 531. But the mere circumstance of the fund remaining unconverted in the hands of the person entitled to it at all events is not, unaccompanied by length of time, evidence of his intention to alter its new character: *Kirkman v. Miles*, 13 Ves. 338; *Re Lewis*, 30 C. D. 654.

(c) *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Chan. Cas. 39; Sugden's Vendors, &c., Ch. 4, s. 1.

(d) *Green v. Smith*, 1 Atk. 572; *Pollexfen v. Moore*, 3 Atk. 272; *Lysaght v. Edwards*, 2 C. D. 499. But in *Re Colling*, 32 C. D. 333, it was held by the Court of Appeal, following the decision of Lord Hatherley in *Re Carpenter*, Kay, 418, 420, that where a contract for sale has not been completed in the lifetime of the vendor he ought not to be declared a trustee within the meaning of the Trustee Act, 1850, unless the right to specific performance has been settled by a decree.

surrender, or even before the time agreed upon for completing the contract, is in equity immaterial (*g*), and if the vendor die before the payment of the purchase-money, it will go to his executors and form part of his assets (*h*): and even if a vendor reserve the purchase-money payable as he shall appoint by an instrument executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets (*i*). So if the contract be valid at the death of the vendor, but the purchaser loses his right to a specific performance by subsequent laches, the estate belongs to the next of kin and not to the heir-at-law (*k*). Again, if a man devises his real estate and afterwards sells it, and the purchase is not completed until after his death, the purchase-money belongs to his personal representatives, notwithstanding the stat. 1 Vict. c. 26, s. 23, and not to his devisee (*l*). So where after making a Will devising a specific estate and bequeathing the personal residue to other persons, a testator entered into a contract, giving an option of purchase over part of the estate, which option was exercised after the death; it was held by Wood,

(*g*) Sugden, *ubi supra*. It was held in the case of *Hudson v. Cook*, L. R. 13 Eq. 417, that where an intestate was at the time of his death under a contract to purchase realty which the vendor might have specifically enforced, but which the vendor afterwards rescinded under a provision in the contract, that the heir-at-law of the intestate was entitled to have the money which would have been applied in the purchase paid to him out of the personal estate instead of the land. This, however, was the case of a person who died intestate in 1869, and was therefore not affected by the two then existing Locke King's Acts, which did not apply to the case of an intestacy. But by the Act of 40 & 41 Vict. c. 34, as to deaths occurring after the 31st of December, 1877, the heir-at-law would not in such a case be entitled to have the unpaid purchase-money discharged out of the personal estate: *Re Cockcroft*, 24 C. D. 94. The rents which accrue between the vendor's death and the time for completing the contract belong to the vendor's heir, and not to his executor: *Lumsden v. Fraser*, 12 Sim. 263. See also *Shadforth v. Temple*, 10 Sim. 184.

(*h*) *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28; *Baden v. Earl of Pembroke*, 2 Vern. 213; *Bubb's Case*, 2 Freem. 38; *Smith v. Hibbert*, 2 Dick. 712; *Foley v. Percival*, 4 Bro. C. C. 429; *Eaton v. Sanxter*, 6 Sim. 517.

(*i*) *Thompson v. Towne*, 2 Vern. 319; *Re Pryce*, [1911] 2 Ch. 286.

(*k*) *Curre v. Bowyer*, 5 Beav. 6, note (*b*).

(*l*) *Farrer v. Winterton*, 5 Beav. 1. See also *Moor v. Raisbeck*, 12 Sim. 123. The law is the same where the sale was by contract under the compulsory powers of a railway company: *Re Manchester and Southport Railway*, 19 Beav. 365. See also *Richards v. Att.-Gen. of Jamaica*, 6 Moo. P. C. 381. On the general question whether the proceeds of compulsory sales, under Acts of Parliament, are to be considered real or personal estate, see *Re Horner*, 5 De G. & Sm. 483; *Re Taylor*, 9 Hare, 596; *Re Stewart*, 1 Smale & G. 32; *Frewen v. Frewen*, L. R. 10 Ch. 610. See also *Re Clowes*, [1893] 1 Ch. 214.

V.-C., that the property was converted, from the date of the exercise of the option, and went to the residuary legatee (*m*).

On the same principle, money covenanted to be laid out in land will descend to the heir (*n*). But where a person covenants to lay out money in land, and afterwards himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for the money, centre in the same person, the money, it should seem, is considered as discharged; as where a man, on his marriage, covenants to lay out a sum of money in the purchase of lands to be settled for the use of himself for life, remainder to his intended wife for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters in tail, remainder to his own right heirs, and the husband does not lay out the money, and survives his wife, who dies without issue; it has been held that the money, though once bound by the articles, became free again by the death of the wife without issue, and the consequent failure of the objects of the several limitations, and was, therefore, at the death of the settlor, his personal estate (*o*).

money covenanted to be laid out in land:

So a testator has the power, by his Will, to change the nature of his real estate, to all intents and purposes, and dispose of it so as to preclude all questions between his real and personal representatives after his death (*p*): This has been sometimes described

conversion "out and out" by Will:

(*m*) *Weeding v. Weeding*, 1 Johns. & H. 424; following *Lawes v. Bennett*, 1 Cox, 167; *Re Marlay*, [1915] 2 Ch. 264; *Re Bogg*, [1917] 2 Ch. 239. But the testator may indicate a sufficient intention to pass whatever estate he had in the property to his devisee, so as to take the case out of the general rule established by *Lawes v. Bennett*. See *Re Pyle*, [1895] 1 Ch. 724, following *Emuss v. Smith*, 2 De G. & Sm. 722. In *Re Isaacs*, [1894] 3 Ch. 506, it was held that the principle of *Lawes v. Bennett* applies to an intestacy, even though the option to purchase is exercisable only after the death of the grantor. The principle of *Lawes v. Bennett* is not to be extended: *Re Dyson*, [1910] 1 Ch. 750.

(*n*) *Edwards v. Countess of Warwick*, 2 P. Wms. 171. The proceeds of realty sold under the Settled Estates Acts, and not yet reconverted into realty, have not become personal property in respect of which letters of administration can be granted, such property being realty converted into personalty to be again changed into realty: *In the goods of Lloyd*, 9 P. D. 65.

(*o*) *Chichester v. Bickerstaff*, 2 Vern. 295. This decision was questioned by Lord Talbot in *Lechmere v. Lechmere*, Cas. temp. Talb. 90, and by Sir J. Jekyll in *Lechmere v. Earl of Carlisle*, 3 P. Wms. 221; but confirmed by Lord Thurlow, in *Pulteney v. Lord Darlington*, 1 Bro. C. C. 238, and the determination of the House of Lords in the same case, 7 Bro. P. C. 530, Toml. edit. See 2 Powell, Dev. 73, Jarman's edit.

(*p*) *Johnson v. Woods*, 2 Beav. 409, 413, by Lord Langdale; *Taylor v. Taylor*, 3 De G. M. & G. 190.

as "a conversion out and out" (q). What are the circumstances in which the heir would be displaced is a question which has been much discussed, and it is now fully established, that in order to exclude the heir, it is not enough that the testator shows an intention that his real estate should be treated as money *after* his death; it must also be apparent that he meant it to be treated as if he had himself actually converted it into personal estate *before* his death, and therefore as personal estate for all intents and purposes, whether the purposes of the Will take effect or not, and not merely for the purposes of his Will: If the property in question was in fact real estate at his death, the *onus* is on the next of kin to show a devise of it in their favour. And though the Will may determine in what quality, the property shall be taken by those on whom it may devolve, yet if it does not also determine who are the persons to take, the original right of the heir-at-law must prevail, and the real estate will be deemed not to be converted for any other purpose than the precise disposition expressed in the Will (r). Therefore, the testator's declaration, however explicit, that the estate directed to be sold shall be absolutely converted, *e.g.*, a direction that it shall be sold and deemed part of his personal estate, will not exclude the heir (s): And the law is the same, even where the direction is accompanied by a declaration, that the proceeds of the land to be converted shall be held as a fund of personal and not real estate, and shall not, nor shall any part thereof, in any event lapse or result for the benefit of the heir (t), or where the direction itself is, that the proceeds shall be considered, "to all intents and purposes," as part of the personal estate (u): The heir must be effectually displaced, and he is not to be displaced by inference or implication. There must be express words taking the property away from the heir and giving it to some

(q) As to this expression, see 10 Beav. 175; 12 Beav. 508.

(r) *Robinson v. Taylor*, 2 Bro. C. C. 593; *Fitch v. Weber*, 6 Hare, 145, 149. A different view must be taken where the question arises on a *deed* which has altered the character of the property before the death of the author of the deed: *Griffith v. Ricketts*, 7 Hare, 299; *Biggs v. Andrews*, 5 Sim. 424.

(s) *Johnson v. Woods*, 2 Beav. 409; *Flint v. Warren*, 16 Sim. 124; *Fitch v. Weber*, 6 Hare, 145; *Bromley v. Wright*, 7 Hare, 334; *Shallcross v. Wright*, 12 Beav. 505; *Taylor v. Taylor*, 3 De G. M. & G. 190.

(t) *Fitch v. Weber*, 6 Hare, 145.

(u) *Robinson v. Governors of the London Hospital*, 10 Hare, 19.

other person or persons, or a plain and obvious intent to that effect to be gathered from the whole Will (x).

It is plain, therefore, that where the conversion of land into money is directed by the testator for a particular purpose, which fails, (as in the case of the death of a party intended to be benefited,) so much of the estate, or of its produce, as remains undisposed of, will result to the heir (y). If, on the other hand, there is a conversion of personal estate into real estate, and there is an ultimate limitation which fails to take effect, the interest which fails results for the benefit of the persons entitled to the personal estate, *i.e.*, the persons who take under the Statute of Distributions as next of kin (z).

conversion for particular purposes which fail :

It is further established, that where a testator directs his real estate to be sold, and the mixed fund arising from the produce of the real estate and the personal estate to be applied to certain specified purposes: if any part of the disposition fails, either by lapse or otherwise, then to the proportional extent in which the real estate would have contributed to that disposition, it is to be considered as failing for the benefit of the heir-at-law, and as so much real estate in that event undisposed of (a).

mixed fund from produce of sale of real estate and personal estate :

(x) *Amphlett v. Parke*, 2 Russ. & M. 221; *Singleton v. Tomlinson*, 3 App. Cas. at pp. 426, 427.

(y) *Ex parte Pring*, 4 Y. & Coll. Exch. 507.

(z) *Hereford v. Ravenhill*, 1 Beav. 481; 5 Beav. 51; *Cogan v. Stephens*, 5 L. J. Ch. 17. If the heir-at-law becomes entitled to an undisposed-of interest in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representatives, and consequently his executor takes it as part of his personal estate. On the other hand, if the next of kin having become entitled to freehold estate dies, there is no equity to change the freehold estate into anything else on his death. It will go to the devisee of the real estate or to his heir-at-law if he has not devised it, and will pass as real estate. The principle is that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. See *Curteis v. Wormald*, 10 C. D. 172. A decree for the sale of real estate having been made in a partition suit, the property was sold, and the proceeds of the sale were paid into Court. Three of the persons entitled to shares in the property died intestate before the money was distributed, leaving their father their heir-at-law and sole next of kin. He took out administration to each of them, and then died intestate, and it was held that the father took his children's shares of the money as their heir-at-law, but that he took them as money, and that on his death they passed to his personal representative, and not to his heir-at-law: *Mordaunt v. Benwell*, 19 C. D. 302. See further, *Re Richerson*, [1892] 1 Ch. 379; *post*, p. 510.

(a) *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Edwards v. Tuck*, 23 Beav. 268; *Bective v. Hodgson*, 10 H. L. C. 656.

effect of
general
residuary
bequest.

A different point arises where there is a general residuary bequest of personal estate, in the same Will in which there is a direction for the conversion of the real estate. The question in these cases is, what is meant to pass by the residue? and what the intention in this respect is, has to be collected from the whole Will taken altogether (*b*). Thus, where the testator by his Will deals with the proceeds of sale of the realty as personalty, and shows a clear intention of dealing with the proceeds as part of his general personal estate, the proceeds will go to the residuary legatees (*c*). It will be otherwise, however, where the real and personal estate are dealt with separately, or are, though blended, the subject of distinct gifts (*d*).

Whether the
property re-
sulting to the
heir shall be
considered
as land or
money.

Whether the property so resulting to the heir shall be considered as land or money in his hands, is a question of some nicety. The rule is thus stated by Chitty, J., in *Re Richerson* (*e*): "It appears to me that the decisions have always gone upon the footing that the heir who takes under circumstances such as these takes the property in the state into which it is converted by the Will. Where there is a partial undisposed-of interest of real estate directed to be sold, that interest results to the heir of the testator, and it becomes personal estate in his hands. . . . There is the other proposition, namely, that, if the purposes of the Will wholly fail—that is, if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made—the property will devolve upon the heir as real estate."

Thus where a deviser directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and if A. dies in the lifetime of the deviser, and the heir stands in his place, the purpose of the testator still applies to the case; therefore the heir will take the share of A. as money and not as land: But if A. and B. both die in the lifetime of the testator, and the whole interest in the land descends

(*b*) *Davenport v. Coltman*, 12 Sim. 610, 613; *Re Richerson*, [1892] 1 Ch. p. 382.

(*c*) *Per* Lord Cranworth, *Taylor v. Taylor*, 3 De G. M. & G. p. 194.

(*d*) *Spencer v. Wilson*, L. R. 16 Eq. 501.

(*e*) [1892] 1 Ch. 379, 381. See also *Bagster v. Fackerell*, 26 Beav. 469; and *ante*, p. 509, n. (*z*). As to what amounts to an election by a person absolutely entitled, see *ante*, p. 505, n. (*b*).

to the heir, the purpose of the testator, that there shall be a sale for the convenience of division, has no application, and the heir will, therefore, take the whole interest as land (*f*).

So where money is laid out in the purchase of land pursuant to directions in a Will, and there is a failure of the ultimate limitations, the land will go to the next of kin of the testator as real estate (*g*).

Money laid out in land will result to next of kin as real estate.

Where all the purposes for which a sale was directed failed in the testator's lifetime, but a sale was notwithstanding erroneously made by the trustees after the testator's death, it was held that the sale did not interfere with the rights of the heir and those claiming under him in his character of heir-at-law and that the proceeds devolved as real estate of the heir (*h*).

It has been laid down that in equity all property, whether real or personal, whatever may be its nature, purchased with partnership capital for the purposes of the partnership trade, continues to be partnership capital, and to have as between the real and personal representatives of a deceased partner the quality of personal estate (*i*). Where, however, a new partner was taken into the firm, and the real property continued to be used for the partnership purposes, but a rent was paid for it,

Real estate purchased with partnership capital.

(*f*) *Smith v. Claxton*, 4 Madd. 492, 493; *Davenport v. Coltman*, 12 Sim. 610, 613. See also on this subject, *Hewit v. Wright*, 1 Bro. C. C. 86; *Wright v. Wright*, 16 Ves. 188; *Dixon v. Dawson*, 2 Sim. & Stu. 340; *Jessopp v. Watson*, 1 Myln. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204; *Burley v. Evelyn*, 16 Sim. 290; *In re Cooper's Trusts*, 4 De G. M. & G. 757; *Wall v. Colshead*, 2 De G. & J. 683; *Clarke v. Franklin*, 4 K. & J. 237; *Bagster v. Fackerell*, 26 Beav. 469. It should be observed that "conversion must be considered in all cases to be directed for the purposes of the Will, and is limited by the purposes and exigencies of the Will. If therefore the real estate is directed to be sold with a view to a disposition made by a Will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, *i.e.*, the title of the heir, although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the Will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the Will has no effect in altering the quality of the property; but the property, even in the shape of lands, retained its pristine and original quality of personal estate for the purposes of determining the ownership": *Bective v. Hodgson*, 10 H. L. C. 637, by Lord Westbury, C.

(*g*) *Cogan v. Stephens*, 5 L. J. Ch. 17; *Curteis v. Wormald*, 10 C. D. 172.

(*h*) *Davenport v. Coltman*, 12 Sim. 610.

(*i*) *Darby v. Darby*, 3 Drew. 495; *Att.-Gen. v. Hubbuck*, 13 Q. B. D. 275. And see the express enactment to this effect contained in the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22.

under the terms of the partnership, to the old partners by the new firm, it was held on the death of one of the old partners that the right of the two owners to whom as landlords the rent became due was to be considered as real estate (*k*).

Property
altered in
nature by
trustees of
an infant :

Another example of land being considered as money, and *vice versâ*, may be found in the cases where guardians or trustees without power in such behalf, alter the nature of the property committed to them. Thus the lands purchased by the guardian of an infant with his personal estate will, in case of his death during his minority, be considered still as his personal property (*l*). So where the trustees of an infant's estate having a considerable sum of money in their hands, out of the profits of his estate, laid it out in a purchase of lands lying near the estate, with the consent of his guardian, and by the conveyance to the trustees, it was declared that they stood seised in trust for the infant, in case, when he came of age, he should agree to it; the infant dying within age, the trustees were held accountable to the administrator of the infant for the sum laid out, and his heir was declared to have no title to the land (*m*). So where an executor in trust for an infant of a lease for ninety-nine years, determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir (*n*).

by committee
of a lunatic :

Again, where the committee of a lunatic invested part of his personal estate in the purchase of lands in fee, it was held that this should be taken as personal estate, and at his death should not go to his heir-at-law (*o*). So where the grantee of the custody of a lunatic, with the rents and profits of the estate purchased lands, the lunatic dying, the question was between the heir and administrator, who should have the benefit of the purchase; and the Court was of opinion, that the administrator should have it, and not the heir; for if the money had not been laid out, it had been clear that the administrator should have had it; and if laying out of the money, would alter the case,

(*k*) *Rowley v. Adams*, 7 Beav. 548. See also *Re Wilson*, [1893] 2 Ch. 340, where an interest in land held by two persons for a common object was held to devolve as real estate.

(*l*) *Gibson v. Scudamore*, 1 Dick. 45.

(*m*) *Lord Winchelsea v. Norcliffe*, 1 Vern. 435.

(*n*) *Witter v. Witter*, 3 P. Wms. 99.

(*o*) *Awdley v. Awdley*, 2 Vern. 192.

then it would be in the power of the grantee of the custody to prefer the heir or the administrator as he pleased (*p*). But it must be observed, that in the management of a lunatic's estate, it is his benefit, solely, which is considered; and, therefore, if it be clearly for his advantage, that the nature of one part of his estate should be altered for the improvement of the other, such alteration will be directed by the Court (*q*); and when such alteration is made, there is no equity between the real and personal representatives, at the lunatic's death, to have the nature of the property restored (*r*).

In the case of *Att.-Gen. v. Ailesbury* (*s*), where money of a lunatic was invested by his committees by order of the Lords Justices having jurisdiction in lunacy, in purchase of lands, which, under their lordships' directions, were conveyed to the committees, "their heirs and assigns upon trust for" the lunatic, "his executors, administrators, and assigns," with a declaration that the land so conveyed (and all others to be purchased in lieu of them under any exercise of certain powers of sale and re-investment which were contained in the deed) should "to all intents and purposes be considered as part of the personal estate of" the lunatic, it was held by the House of Lords, upon the death of the lunatic, who never recovered, that the value of the lands was part of the personal estate of the lunatic, and liable to probate duty.

By stat. 53 Vict. c. 5, s. 117, certain provisions are made for 53 Vict. c. 5.
the sale or mortgage or other disposition of the lunatic's pro-

(*p*) *Lord Plymouth's Case*, 2 Freem. 114.

(*q*) *Ex parte Phillips*, 19 Ves. 123; *Att.-Gen. v. Marquis of Ailesbury*, 12 App. Cas. 688, by Lord Macnaghten. Ordinary and necessary repairs to freehold houses should be done at the expense of the lunatic's personal estate: *Re Badcock*, 4 My. & Cr. 440. In matters outside the ordinary course of management, it is the duty of the Court, as far as possible, not to alter the devolution of the property. In exercising the power given to the judge by sect. 118 of the Lunacy Act, 1890, to charge moneys expended or to be expended under his order for the permanent improvement of the property of a lunatic upon the improved property, the judge may take into consideration, not only the benefit of the lunatic personally, but also what is fair and right as between his real and personal estates. Regard ought also to be had to the nature and extent of the estate, and to the difficulty in drawing a line between ordinary repairs and permanent improvements: *Re Gist*, [1904] 1 Ch. 398.

(*r*) *Oxenden v. Lord Compton*, 2 Ves. Jun. 69; *Re Leeming*, 3 De G. F. & J. 43; *Re Freer*, 22 C. D. 622. See also *per* Vaughan Williams, L. J., in *Re Gist*, [1904] 1 Ch. at p. 409.

(*s*) 12 App. Cas. 672.

property for debts, maintenance, and other purposes. By sect. 123 (1) it is provided that "The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act, which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of." And sub-sect. (2) provides for the disposition of moneys arising in certain ways as between the real and personal representatives of the lunatic.

The transfer of a fund representing the proceeds of sale of real estate from one lunacy to another lunacy does not effect a conversion (*t*).

Compulsory
sale of
lunatic's land
under
Lands Clauses
Act.

In *Ex parte Flamank* (*u*), Lord Cranworth, V.-C., held that money paid into Court by a Railway Company for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state till his death, but was not the subject of a Commission of Lunacy, was not to be re-invested in or considered as land, but to be paid to his executors; for that the effect of the 7th section of the Act was to make the contract as good as if he had been *compos mentis* (*x*).

Property of
mortgagee in
possession
altered by
operation of
the Real
Property
Limitation
Acts.

"Where a person dies entitled to a mortgage interest, that is personal estate at that time; and though afterwards the mortgagor may be barred, that would not convert the property as between the representatives at the time of his death from personal to real: but the person taking it as real would be a trustee for the persons entitled to it at the death of the testator, such as it was. But if that person, alone entitled at the death of the testator, remains in possession in the same manner as his ancestor was, without any act as between him and the mortgagor, there being a clear option in a question with himself to determine, whether it shall be real or personal estate, if he lets it become real, no one has a right to say, it shall be personal" (*y*).

(*t*) *Re Alston*, [1917] 2 Ch. 226.

(*u*) 1 Sim. N. S. 260.

(*x*) See *Cramer's Case*, 1 Smale & G. 32, and *Re Harrop's Estate*, 3 Drew. 726, for instances where money paid into Court under certain local Acts was treated as realty.

(*y*) *Per* Lord Eldon in *Att.-Gen. v. Vigor*, 8 Ves. 256, 277.

Where the mortgagor's claim is not barred at the death of the mortgagee in possession, the widow of the mortgagee is not entitled to dower out of the estate, since in order to consider whether the widow is dowable, it is necessary to look at the matter as it stood at the husband's death and not at subsequent events (z).

In *Re Loveridge* (a) a mortgagee of freeholds entered into possession of the mortgaged land in 1861, and remained in possession until 1864, when he died leaving all his property to his widow for life, but otherwise intestate. The persons entitled under the Statutes of Distribution to his personal estate at the time of his death were his widow, and his brother, Isaac Loveridge, who was also his heir-at-law and a person of unsound mind. Isaac Loveridge died intestate in 1880, leaving as his legal personal representative Mr. Pearce, and as his co-heiresses Mrs. Arnopp and Mrs. Ames. The widow, the tenant for life, died in 1900. The question to be determined was whether, after possession for three years by the testator followed by possession by the widow until the equity of redemption was barred by the Real Property Limitation Act, 1874, the mortgaged land was, for purposes of devolution from the testator, to be treated as realty or personalty. Buckley, J., held that the property was for the purposes of such devolution to be treated as personalty. Subsequently (b) the further question arose whether the moiety of the mortgaged property to which Isaac Loveridge was entitled became on January 1st, 1879, when the equity of redemption was barred, real estate and belonged to his heiresses or whether it remained personalty and belonged to his next of kin. Buckley, J., held that as from the time when the rights of the mortgagor were barred, the rights of the widow and the brother claiming under the mortgagee, which theretofore had been to have payment of the money and to hold the land as security, were enlarged; and that as they could not have security against land of their own, their right was to the land. In such a case no election is required. Without any election what was previously personalty became realty. If Isaac Loveridge had been the only person interested, the matter would have been unarguable, as the statute effected a statutory

(z) *Flack v. Longmate*, 8 Beav. 420, 424.

(a) [1902] 2 Ch. 859.

(b) [1904] 1 Ch. 518.

conveyance of the land. It makes no difference that the parties interested are two.

What is personal estate.

In pursuing the complicated inquiry, of what shall be accounted personal estate, it will be advisable to consider the subject in the divisions employed by Godolphin and the author of the Office of an Executor, viz., first to divide the effects of the deceased into things actually in his possession, and things not so, usually called *Choses in action*—and to subdivide the first class into chattels real, and chattels personal.

CHAPTER THE FIRST.

THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR IN THE
CHATTELS REAL OF THE DECEASED.

SECTION I.

*The Executor's or Administrator's Right to Chattels Real,
generally.*

THE general rule is, that chattels real shall go to the executor or administrator, and not to the heir. Chattels real are such as concern or savour of the realty (*a*); or, in other words, they are chattel interests issuing out of, or annexed to, real estates (*b*). Thus, while the military tenures subsisted, wardship in chivalry was accounted such an interest, and accrued to the executor or administrator, and not to the heir; because it was in respect of a tenure of land or other hereditament, and was for years, viz., during the minority, or till marriage had (*c*).

What are
chattels real.

If one be seised in his natural capacity of an advowson in gross, or in fee appendant to a manor, and the church becomes void, the void turn is a chattel personal, like rent due, or any other fruit fallen; and if the patron dies before he presents, the avoidance does not go to the heir, but to the executor (*d*): And the heir in tail shall not have a presentment fallen in the life of the tenant in tail, but the executor of the tenant in tail (*e*). Again, if the patron, whether a natural or politic person, grant the next presentation of a church before avoidance, to D., in this

Next presen-
tation to a
church.

(*a*) Co. Litt. 118, *b*.

(*b*) 2 Black. Comm. 386.

(*c*) Godolph. Pt. 2, c. 13, s. 2; Wentw. Off. Ex. 126, 14th edit. So a villain for years (as by grant for a term from him that had the inheritance) was a chattel real: *Ibid*.

(*d*) F. N. B. 33, P.; *The Queen and Archbishop of Canterbury's Case*, 4 Leo. 109; Co. Litt. 388, *a*; Wats. C. L. 72, 4th edit.

(*e*) F. N. B. 34; Godolph. Pt. 2, c. 13, s. 6.

case, if D. dies, his executor shall have it as a chattel, and not the heir (*f* : for it is a chattel real, till a vacancy has happened, and afterwards the vacancy turns it into a chattel personal (*g*). Nor will it alter the case, if the grant is to the grantee *and his heirs* ; for where the thing is a chattel, the word " heirs " cannot make it an inheritance (*h*). Likewise, if a man grants the two next presentations of a church, those are chattels, and if the grantee dies, the executor shall have them, and not the heir (*i*). So of an advowson granted to one and his heirs for 100 years (*k*). Again, if a church become void during the life of a husband, who is tenant by the curtesy, and he die before the church is filled, the husband's executor shall have the turn, and not the wife's heir (*l*).

And it is now settled that the executor has the same right, where a person seised of an advowson in a *politic* capacity dies during a vacancy (*m*). In the case of a bishop, however, the void turn of a church, the advowson whereof belongs to him in right of his bishopric, by his death does not go to his executor, although the church was void when the bishop died: but the King shall present by reason of his custody of the temporalities (*o*).

But if the incumbent of a church be also seised in fee of the advowson of the same church and dies, his heir, and not his executor, shall present; for although the advowson does not descend to the heir till after the death of the ancestor, and by his death the church is become void (so that the presentation in this case may be said to be severed from the advowson before it descends to the heir, and to be vested in the executor), yet both the descent to the heir and this fall of the avoidance happened all in one instant: and where two titles concur, the older right shall be preferred (*p*). In the case of an advowson of a *donative*

(*f*) Godolph. Pt. 2, c. 13, s. 3: admitted by Lord Tenterden, in *Rennell v. Bishop of Lincoln*, 7 B. & C. 113, 193.

(*g*) Wentw. Off. Ex. 131, 132, 14th edit.

(*h*) Bro. Chattels, pl. 6.

(*i*) *Ibid.* 20.

(*k*) Wentw. Off. Ex. 136, 14th edit.

(*l*) Wats. C. L. 71, 4th edit.

(*m*) *Rennell v. Bishop of Lincoln*, 8 Bingh. 490; 1 Clark & F. 527.

(*o*) 2 Roll. Abr. Presentment, 345 (E.), pl. 4; Co. Litt. 90, a; Co. Litt. 388, a; Wats. C. L. 73, 4th edit.

(*p*) *Holt v. Bishop of Winchester*, 3 Lev. 47. Where a parson, who had the inheritance of the advowson, devised that his executor should present after his decease, and devised the inheritance to another in fee, it was held that this was a good devise of the next avoidance: *Pynchyn v. Harris*, Cro. Jac. 371.

benefice, where A. B., being seised, the church in his lifetime became void; then A. B. died, and the executors brought a *quare impedit*; after two arguments in C. B., the whole Court was clearly of opinion that the right of donation descended to the heir of A. B., and that the executor had no title, as he would have had, if it had been a presentative benefice (*q*). So if the parson of a church ought to present to a vicarage, if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage, and not the executor of the deceased parson, shall present (*r*).

If the testator presents, and (his clerk not being admitted before his death) then his executors present their clerk, the Ordinary is at his election, which clerk he will receive (*s*).

Every bishop, whether created or translated, was formerly bound, immediately after confirmation, to make a legal conveyance to the archbishop of the next avoidance of one such dignity or benefice belonging to his see as the said archbishop should choose or name, which was, therefore, commonly called an *option* (*t*). And if the archbishop died before the avoidance happened, the right of filling up the vacancy went to his executors or administrators (*u*).

The options of an archbishop passed to his executors, &c.

All leases and terms of lands, tenements, and hereditaments, of a chattel quality, are chattels real, and will go to the executor or administrator (*x*). All interests for a shorter period than a

Estates for years:

(*q*) *Repington v. Tamworth School*, 2 Wills. 150. No reason is assigned, in the report of this case, for the distinction taken, nor is it easy to suggest one. See the remarks of the judges in *Rennell v. Bishop of Lincoln*, 7 B. & C. 113. An advowson donative is where the King, or any subject by his licence, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, not to that of the Ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction: Cruise, T. 21, ch. 1, s. 21.

(*r*) 2 Roll. Abr. 346, tit. Presentment (F.), pl. 4; 1 Burn, E. L. 139, 8th edit.

(*s*) *Smallwood v. Bishop of Lichfield*, 1 Leon. 205; Wats. C. L. 72, 225, 4th edit.

(*t*) 1 Gibbs. Cod. 115; 1 Burn, E. L. 239, 8th edit. It has been considered that such assignments have been rendered illegal by reason of the stat. 3 & 4 Vict. c. 113, s. 42, and that the archbishop's options have thus been destroyed: at all events they are now obsolete.

(*u*) *Potter v. Chapman*, Ambl. 98; 1 Burn, E. L. 240, 8th edit.

(*x*) So it is with an option as an incident of a lease. Thus an option by the lessee to purchase the fee simple of the land demised is attached to the lease and passes with it to the administrator as part of an intestate's personal estate: *Re Adams and Kensington Vestry*, 24 C. D. 199; 27 C. D. 394. But it must not exceed the limit allowed

life, or more properly speaking, all interests for a *definite* space of time, measured by years, months or days, are deemed chattel interests, and of the nature, for the purposes of succession, of other chattels or personal property (*y*). But an estate for one's own life, or for the life of another, is a freehold; and if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during the coverture, or as long as the grantee shall dwell in such a house, or so long as he pays 10*l.*, &c., or until the grantee be promoted to a benefice, or for any like *uncertain* time; in all these cases the lessee has an estate of freehold in judgment of law (*z*); while a lease for 10,000 years is not a freehold, but chattel interest. How far leases *pur autre vie* can devolve as personal estate will be considered later (*a*).

Term for a certain number of years if A. B. so long live:

If an estate be limited to A. B. and his assigns during C. D.'s life, it is a freehold interest; but if it be limited to A. B. and his assigns for a certain number of years, if C. D. shall so long live, it is a chattel, and will go to his executors or administrators.

lease for life made by lessee for years:

If a lessee for years of a carve of land (*b*) grants to another a rent out of the said carve for the life of the grantee, that is a good charge during the term, if the grantee so long live; but in such a case the grantee hath but a chattel (*c*).

lease for A.'s life, and if he die within a

A. made a lease to B. for life by indenture, in which was a proviso, that if the lessee died before the end of sixty years then

by the rule against perpetuities: *Woodall v. Clifton*, [1904] W. N. 205; cf. *L. & S. W. Ry. Co. v. Gomm*, 20 C. D. 562; *Muller v. Trafford*, [1901] 1 Ch. 54. A rent-charge issuing out of leasehold land held for the residue of a term of years is a chattel real: *Re Fraser*, [1904] 1 Ch. 111, 726. Estates for years have one quality of real property, viz., immobility, but want the other, viz., a sufficient legal indeterminate duration, the utmost period for which they can last being fixed and determined: 2 Black. Comm. 386.

(*y*) 1 Preston on Estates, 203. An estate of freehold may be defined to be "an estate in possession, remainder or reversion, in corporeal or incorporeal hereditaments held for life or for some uncertain interest, created by Will or by some mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee or of some other person." See Watk. on Conv. by Morley & Coote, 9th edit. p. 65.

(*z*) Co. Litt. 42, *a*. So where A. leases to B., till A. makes J. S. baily of his manor; adjudged a freehold: *Ibid.* Hal. MSS. See also Beeson, App., Burton, Resp., 12 C. B. 647.

(*a*) See *post*, p. 524.

(*b*) Carve of land is synonymous with *caracuta terræ*, a plough land, and may contain houses, pastures, &c.: Cowell; Co. Litt. 86, *b*.

(*c*) *Butt's Case*, 7 Co. 23, *a*; *Saffery v. Elgood*, 1 A. & E. 191; *Re Fraser*, [1904] 1 Ch. 111.

next ensuing, his executor should have and enjoy, as in the right and title of the lessee, for term of so many of the years as amounted to the whole number of sixty, so that the commencement of the said sixty shall be accounted from the date of the said indenture: The lessee made two executors, and died: One of them entered into the land: And the opinion of the Court was, that no lease for years was made by this proviso in the lessee, nor by remainder in his executor; because nothing of the said term was limited to the lessee for life as remainder to him and his executors (*d*).

certain time to his executor for the rest of that term.

There are, however, certain interests in land, which although of an uncertain duration, and therefore in that respect participating of the nature of freehold, are nevertheless chattels. These are interests created by the statute law, and are securities for the payment of debts, namely, estates by statute merchant, statute staple, and by *elegit*, the possessors of which are said to hold their lands as freehold, but whose interests are really chattel, and will go to their executors and administrators (*e*).

Estates by statute staple, statute merchant, and by *elegit*.

Since an estate of freehold or inheritance cannot be derived out of a term for years, no words of limitation can alter the nature of the latter with respect to the purposes of succession. Thus if a lease for years be made to a man and his heirs, it shall not go to his heirs but his executors (*f*).

A lease for years made to one and his heirs shall go to the executor of the devisee:

So if a lease for years be made to a bishop, parson, or other sole corporation, and his successors, yet it will go to the executors of the lessee: because a term for years being a chattel, the law allows none but personal representatives to succeed thereto, nor can this mode of succession be altered by any limitation of the party (*g*).

A lease for years made to a sole corporation and his successors will go to his executors:

Again, it is a principle of law, that a limitation of a personal estate to one in tail vests the whole in him. Therefore, where a term for years is devised to one and the heirs of his body,

lease for years devised to a man in tail shall go to his executors:

(*d*) *Gravener v. Parker*, Anders. 19: *sed quære*; and see *ante*, p. 483, n. (*e*).

(*e*) Co. Litt. 42, *a*; 2 Saund. 68, *f*, note to *Underhill v. Devereux*; Watk. on Conveyancing, by Morley & Coote, 63. See also Wentw. Off. Ex. 133, 134, 135, 14th edit.

(*f*) Co. Litt. 46, *b*. So if a term for years grant a rent out of the land to A. and his heirs, the same shall go to the executor, and not to the heir; for being derived out of a chattel, it must be itself a mere chattel: *Partus sequitur ventrem*: Wentw. 136, 14th edit.; *Re Fraser*, [1904] 1 Ch. 111, 726.

(*g*) Co. Litt. 46, *b*; *Fulwood's Case*, 4 Co. 65, *a*. See *Dollen v. Batt*, 4 C. B. N. S. 760, as to what reservations make a freehold, and what a chattel lease.

or to the heirs male of his body, the term, at the death of the devisee, shall go to the executor and not to the heir (*h*).

So if a lease for years is given to A. and the heirs male of his body, and for default of such issue, to B. and the heirs male of his body, these words give to A. the absolute property in the whole estate and interest transmissible to his personal representatives (*i*). In a case, where the testator devised his real estates to A. for life, without impeachment, &c., with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of A. and by codicil, reciting the after-purchase of a leasehold estate, he devised the same to the trustees named in his Will, "for such estate and estates and in such manner and form" as his real estates were given by Will: It was held that A., taking an estate tail in the real estates under the Will, was nevertheless entitled to the absolute interest in the leasehold bequeathed by the codicil (*k*).

A lease for years given to A. for life, and afterwards to his heirs general or special, will go to his executors.

With respect to the limitation of real estates, where an estate for life is given to the ancestor, followed by a subsequent limitation to his heirs general or special, the subsequent limitation, as in the case just stated, vests in the ancestor, and the heir takes not by purchase. So in the limitation of leasehold estates, generally speaking, if a term for years be devised to one for life, and afterwards to the heirs of his body, these words are words of limitation, and the whole vests in the first taker, and is transmissible to his executor.

Thus, in *Theobridge v. Kilburne* (*l*), where a term was limited in trust for S. for life, and immediately from and after her decease, to the heirs of the body of S. lawfully to be begotten, if the term should so long endure, and in default of such issue, then to B.: Lord Hardwicke expressed himself of opinion that the whole term vested in S. Again in *Garth v. Baldwyn* (*m*), where real and personal estates were devised to trustees, in trust to pay the profits to G. during his life, and afterwards to pay the same to the heirs of his body, Lord Hardwicke held, that the personal estate vested absolutely in

(*h*) *Leonard Lovie's Case*, 10 Co. 87, *b*; Wentw. Off. Ex. 136, 14th edit.; 1 Prest. on Estates, 32. See *post*, Pt. III. Bk. III. Ch. II. § II. (B.).

(*i*) *Leventhorpe v. Ashbie*, 1 Roll. Abr. 611 (L.), pl. 1; *Donn v. Penny*, 1 Meriv. 20.

(*k*) *Brouncker v. Bagot*, 1 Meriv. 271.

(*l*) 2 Ves. Sen. 233.

(*m*) *Ibid.* 646.

G. by this limitation. So in *Verulam v. Bathurst* (*n*), where a testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life for her separate use, and, from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of the daughter lawfully begotten, but in case her daughter should happen to die without any lawful issue living at the time of her decease, she gave the house and the stock over; it was held by Sir L. Shadwell, V.-C., that the daughter took the property absolutely.

However, if there appears any other circumstance or clause in the Will, to show the intention that these words should be words of purchase, and not words of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase to the exclusion of his executor (*o*).

The chattels real which go to the executor or administrator are not confined to terms or leases of lands, but extend to chattel interests in incorporeal hereditaments, such as leases for years of commons, tithes, fairs, markets, profits of leets, corodies for years, and the like (*p*).

Leases of
incorporeal
heredita-
ments.

In the case of a tenancy from year to year as long as both parties please, since the death either of the lessor or lessee does not determine it, the interest of the tenant is transmissible to his executor or administrator (*q*). Therefore due notice to quit must be given to the latter before the lessor or his representative can recover in ejectment (*r*); and the executor or administrator of the lessee may maintain ejectment; and it was held no objection that the demise in the declaration was stated to be for seven years (*s*). So where W. H. being tenant from year to year to Lady H., died, leaving his widow in possession; and J. H. some time afterwards took out administration to the deceased, but the widow continued in possession, paying rent to Lady H., with the knowledge of J. H., who never objected to such payment or made any demand of rent; it was held, that there was no evidence of a determination of the tenancy from

Estate of
tenant from
year to year
goes to his
executor, &c.

(*n*) 13 Sim. 374.

(*o*) See *Fearne*, Cont. Rem. 490 *et seq.* 7th edit.; *Doe v. Lyde*, 1 T. R. 593; *Knight v. Ellis*, 2 Bro. C. C. 570; *Ex parte Sterne*, 6 Ves. 156; *post*, Pt. III. Bk. III. Ch. II. § II.

(*p*) *Wentw. Off. Ex.* 131, 14th edit.; *Godolph. Pt.* 2, c. 13, s. 3.

(*q*) *Doe v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. 393.

(*r*) *Parker v. Constable*, 3 Wils. 25; *Rees v. Perrot*, 4 C. & P. 230.

(*s*) *Doe v. Porter*, 3 T. R. 13.

year to year by operation of law, and that the administrator was entitled to recover possession from the widow (*t*).

Leases held in joint tenancy do not pass to the executor, &c.

If a lease is made to several for a term of years, and one of the joint tenants dies, his interest accrues to the survivors, and his executors or administrators shall take none (*u*).

Terms for years vest in the executor though specifically devised :

It may be advisable here to remark, that even when a term for years is specifically devised, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to which the testator's assets shall be applied, and the legatee has no right to enter without the executor's special assent (*x*).

he cannot waive a lease though it be worth nothing.

If the testator had a term for years, this vests in the executor or administrator, and he cannot refuse it though it be worth nothing; for the executorship or administratorship is entire, and must be renounced *in toto*, or not at all (*y*).

Equitable interests in terms.

Generally speaking, the Courts of Equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interests in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest, and is transmissible to the personal representatives in the same manner as the legal estate.

Estates *pur autre vie*.

For a statement of the interest of an executor or administrator in estates, *pur autre vie*, by the common law and the statute 29 Car. II. c. 3, s. 12, and for the cases decided thereunder, the reader is referred to the earlier editions of this Work (*z*). This statute was repealed by the Wills Act, 1837 (1 Vict. c. 26), s. 3 (which, however, does not extend to any Will made before January 1, 1838), by which section estates, *pur autre vie*, may be disposed of by Will, executed as required by that Act, whether there shall or shall not be any special occupant thereof, and of whatever tenure they shall be, and whether the same shall be a corporeal or incorporeal hereditament.

Stat. 1 Vict. c. 26, s. 6.

And with respect to the estate, *pur autre vie*, of any deceased person, *who shall not have died before the 1st day of January, 1838*, the same statute, (after repealing previous statutes re-

(*t*) *Doe v. Wood*, 14 M. & W. 682.

(*u*) Co. Lit. 182, *a*. See *ante*, p. 495 *et seq.*

(*x*) See *ante*, p. 501, and *post*, Pt. III. Bk. III. Ch. iv. § III.

(*y*) *Billinghurst v. Spearman*, 1 Salk. 297; *Ackland v. Pring*, 2 Mann. & Gr. 937. As to his liability to pay the rent and perform the covenants of his lease, notwithstanding he has no assets, see *post*, Pt. IV. Bk. II. Ch. I. § II.

(*z*) Pt. II. Bk. II. Ch. I. § I.

lating to estates *pur autre vie*,) proceeds to enact, by sect. 6. that if no disposition shall be made thereof by Will, and in case there shall be no special occupant thereof it shall go, (whether freehold or customary freehold, tenant right, customary or copyhold (b), or of any other tenure, *and whether a corporeal or incorporeal hereditament*,) to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of special occupancy, or by virtue of this Act, it shall be assets in his hands, and shall go in the same manner as the personal estate (a).

With respect to the title of an executor or administrator of a mortgagee to the mortgaged property, formerly, at law, this depended on the fact whether the mortgage was in fee or for years: in the former case the legal estate in the land descended to the heir; and in the latter, it went, like any other term for years, to the executor: But with regard to the money due upon the mortgage, it was fully established in equity, that, in every case, it was to be paid to the executor or administrator of the mortgagee (d). Consequently, if the mortgage were in fee, the heir or devisee of the mortgagee was a trustee of the land for the executor or administrator; and would, upon application, be directed to convey to him (e). So if the land became irredeemable in the hands of the heir, either by the length of possession, or by his purchasing the equity of redemption, or foreclosing, it nevertheless belonged to the personal representative, and the heir was considered a trustee for him (f). And now in all cases of death after December 31, 1881, it is provided by the Con-

Mortgages:

considered
part of the
personal
estate:

Conveyancing
Act, 1881,
s. 30.

(b) The statute of Car. II. did not extend to copyholds: *Zouch v. Forse*, 7 East, 186.

(c) In a case where leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequels in right, executors, administrators, and assigns, and A. survived the deviser, and being illegitimate, died without heirs and intestate, living the *cestui que vie*, it was held that the section applied to equitable estates in land, and that the devised estates passed under it to A.'s administrator (the nominee of the Crown): *Reynolds v. Wright*, 2 De G. F. & J. 590; 25 Beav. 100. As to what words are necessary to create a special occupant in a deed or Will, see *Earl of Mountcashell v. More-Smith*, [1896] A. C. 158; *Re Sheppard*, [1897] 2 Ch. 67; *Re Inman*, [1903] 1 Ch. 241.

(d) *Thornbrough v. Baker*, 1 Chanc. Cas. 283.

(e) *Ellis v. Guavas*, 2 Chanc. Cas. 50; considered in *Re Loveridge*, [1902] 2 Ch. at p. 864; *ante*, p. 515.

(f) *Ibid.*; *Canning v. Hicks*, 2 Chanc. Cas. 187; *Tabor v. Grover*, 2 Vern. 367. But it would seem, that if the heir chooses, he may pay off the mortgage money to the executor, and retain the land: *Clerkson v. Bowyer*, 2 Vern. 66.

Conveyancing Act, 1881, s. 30, that all estates vested in any person solely by way of mortgage shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives as if the same were a chattel real, and for the purposes of this section the personal representatives of a deceased person are to be deemed his heirs and assigns within the meaning of all trusts and powers (*g*).

in what case
the heir
entitled:

A man having mortgages, one of which was a mortgage in fee of lands in D., on which he had entered, devised those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c. One of the daughters died and her husband and administrator claimed her share of the mortgage so devised, on the ground of its being a mortgage not foreclosed, nor the equity of redemption released. The Court held that although it was a mortgage as between the mortgagor and mortgagee; yet the testator's intent was it should pass to his daughters as a real estate, to them and their heirs, and not as part of his personal estate, that the deceased daughter's share descended to her sisters as her heirs-at-law, and her husband as her administrator, ought not to have any part thereof as personal estate (*h*).

So where a man purchased an estate, which afterwards proved to be subject to an equity of redemption, and died, the mortgage debt was held to belong to his heir, and not his executor (*i*). Again, if mortgage money be articulated to be laid out in land and settled, the money will be bound by the articles (*k*). So if the mortgagee in his lifetime obtain a release of the equity of redemption, or obtain an absolute decree of foreclosure, and enter into possession, and after his death, the foreclosure shall be opened, or the release set aside, it would seem that the heir, and not the executor, will be entitled to the money (*l*).

when a mort-
gage merges:

If the mortgagee becomes entitled to the land in fee simple, as if it descends upon, or is devised to him, a question may arise

(*g*) By sect. 88 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46), "Section 30 of the Conveyancing Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust or by way of mortgage." See also Land Transfer Act, 1897, s. 1 (4), and Conveyancing Act, 1911, s. 8.

(*h*) *Noys v. Mordaunt*, 2 Vern. 581; and cf. *ante*, p. 504.

(*i*) *Cotton v. Iles*, 1 Vern. 271; Coote on Mortg. 8th edit. 870.

(*k*) *Lawrence v. Beverley*, cited 3 P. Wms. 217, in *Lechmere v. Carlisle*.

(*l*) *Ibid.*

between his heir and executors, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest arises, whether the charge be kept on foot, or not, it will be extinguished in equity upon the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him (*m*). But if a purpose, beneficial to the owner, can be answered by keeping the charge on foot, so that the charge would be disposable by him, though the land would not (*n*): or a beneficial use might have been made of it against a subsequent incumbrancer (*o*), or the other creditors of the person from whom the party derived the onerated estate (*p*): in these, and similar cases, equity will consider the charge as subsisting, notwithstanding that it might prior to the Judicature Act have been merged at law (*q*): and the rule is adopted in favour of the creditors of the person in whom these interests centre (*r*).

Where the owner of the equity of redemption takes a transfer of the mortgage and there is a declaration that the mortgage is to be kept on foot for the protection of the mortgagor, the mortgage will pass on his death intestate to his next of kin, and the result is the same though the charge is to be kept on foot for the benefit of the mortgagor "his heirs and assigns" (*s*).

(*m*) 2 Powell, Dev. 146, Jarman's edit.; *Grice v. Shaw*, 10 Hare, 76; *Ingle v. Vaughan Jenkins*, [1900] 2 Ch. 368; but see *Manks v. Whiteley*, ante, p. 487. When the owner of an estate has also a charge on it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say that without some special act, no presumption can be made of an intention to merge the charge in fee; for that might be against the interest of the owner by letting in the intermediate estate or incumbrance. But where the intermediate interest is created by the act of the owner himself, this reasoning has no application: *Johnson v. Webster*, 4 De G. M. & G. 474, 488, by Lord Cranworth; and see *Re French-Brewster's Settlements*, [1904] 1 Ch. 713.

(*n*) *Thomas v. Kemys*, 2 Vern. 348.

(*o*) *Gwillim v. Holland*, cited 2 Ves. Jun. 263.

(*p*) *Forbes v. Moffat*, 18 Ves. 384.

(*q*) Powell, Dev. *ubi supra*; *Byam v. Sutton*, 19 Beav. 556. Now by sect. 25 (4) of the Judicature Act, 1873, there shall not, after the commencement of that Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

(*r*) *Powell v. Morgan*, cited 2 Vern. 206; Powell, Dev. *ubi supra*.

(*s*) *Re Gibbon*, [1909] 1 Ch. 367.

title of executor of mortgagor in case of a mortgage with power of sale.

Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors or administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate, as the equity of redemption descends to the heir-at-law (*t*).

Devise of land to executors for payment of debts.

At common law, where a man devised land to his executors for payment of his debts, or until his debts were paid, or till a particular sum should be raised out of the rents or profits, the executors took thereby only a chattel interest, *i.e.*, an estate for so many years as were necessary to raise the sum required (*u*): and this interest determined when the rents or profits would have raised the sum, although the executors might have misapplied them (*v*). But by stat. 1 Vict. c. 26, s. 30, where any real estate (other than a presentation to a church) shall be devised to any trustee or executor, such devise [if the Will be made on or after January 1, 1838] shall pass the fee simple or other the whole estate of the testator, unless a definite term of years, or an estate of freehold, shall thereby be given to him expressly or by implication (*x*).

Stat. 1 Vict. c. 26, s. 30.

SECTION II.

Right of Executors and Administrators to Chattels Real, with relation to Husband and Wife.

Before quitting the inquiry as to the interest which executors and administrators have in the chattels real of the deceased, it is proper to consider the subject as it bears on the relation of husband and wife. It is therefore proposed to investigate: 1st, when the wife survives, the rights of the executor or administrator of the husband to her chattels real: 2nd, when the husband survives, the rights of the administrator of the wife to the same.

45 & 46 Vict. c. 75.

This subject has, however, become of much less practical importance than formerly by reason of the Married Women's Property Act, 1882.

(*t*) *Wright v. Rose*, 2 Sim. & Stu. 323; *Bourne v. Bourne*, 2 Hare, 35.

(*u*) *Ackland v. Lutley*, 9 A. & E. 879; *Ackland v. Pring*, 2 M. & Gr. 937.

(*v*) *Carter v. Barnadiston*, 1 P. Wms. 509, 519; *Ackland v. Lutley*, 9 A. & E. 879.

(*x*) See also 1 Vict. c. 26, s. 31.

By section 1 (1) of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it is enacted that "a married woman shall in accordance with the provisions of this Act be capable of acquiring, holding, and disposing by Will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee" (y).

By sect. 2 of the Married Women's Property Act, 1882, every woman who marries *after* the commencement of that Act (viz., January 1, 1883) is entitled to have and to hold as her separate property, and to dispose of by Will, or otherwise, in

(y) Notwithstanding the wide terms of this sub-section, it would seem that the devolution of the chattels real of the wife is unaltered, and that the effect of the Act is merely, 1. That the husband is deprived of the power of divesting his wife of her chattels real during coverture; and 2. That if the wife do not alien her chattels real in her lifetime, or by her Will, and the husband survive her, he will take such chattels real as are affected by the Act, not as a marital right, but as the administrator of his wife. In other words, this enactment does not affect the devolution of the wife's property but only the "*jus mariti*," and it would seem, therefore, that, although under each of the above-mentioned sections (2 and 5) the married woman is entitled to have and to hold the property as her separate property, and to dispose of it "in manner aforesaid," i.e., "as if she were a *feme sole*" (sect. 1 (1)), the statute only means that she is to have the legal estate in the property, and that, therefore, if she dies without having aliened or disposed of it by Will, her husband will have no right to it "*jure mariti*," because it never was his, yet he will still have the right (continued to him by the Statute of Frauds notwithstanding the Statute of Distributions) to administration and enjoyment of his wife's assets. In *Reid v. Reid*, 31 C. D. 402, it was held by the Court of Appeal that if a woman married before the Act has, before the commencement of the Act, acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate by sect. 5 (1) of the Act, though it falls into possession after the Act: *Re Bacon*, [1907] 1 Ch. 475. As to undisposed of separate property accrued to a married woman before the Act, it has been held by Stirling, J., in *Re Lambert*, 39 C. D. 626, that the husband's right to such property is unaffected by sect. 1 (1) of the Married Women's Property Act, 1882. The learned judge points out that, even before the Act, a married woman might always dispose of her separate property by Will, but that, to the extent that she did not, the husband's right accrued on her death. This right he held to be unaffected by the Act. The result as to chattels real acquired before 1 Jan., 1883, by a woman married before and dying after that Act, and belonging to her for her separate use, would seem to be that letters of administration are unnecessary in cases where the husband survives the wife, unless indeed the interest of the wife consists of a mere right of action. But the husband is subject to the same liabilities as regards such separate property as the wife would have been subject to if still living, he being her personal representative within the meaning of sect. 23 of the Married Women's Property Act, 1882. See *Re Bellamy*, 25 C. D. 620; *Surman v. Wharton*, [1891] 1 Q. B. 491.

the same manner as if she were a *feme sole*, all real and personal property belonging to her at the time of marriage, or acquired by, or devolving on, her after marriage, and by sect. 5 every woman married *before* the commencement of the Act (viz., January 1, 1883) is entitled to have and to hold, and to dispose of by Will, or otherwise, in the same manner as if she were a *feme sole*, as her separate property all real and personal property, her title to which, whether vested, or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act (z).

The effect of this Act is, it seems, to extend the power which before the Act a married woman possessed to dispose of such chattels real as were settled to her separate use, and to give the same power to a woman married before January 1, 1883, in respect of any chattels real, her title to which accrues to her after that date, and to a woman married on or after January 1, 1883, in respect of all chattels real, whensoever and howsoever her title to them may accrue (a).

It follows that if the wife survive her husband his executor or administrator has no right whatever to such chattels as by the statute are made the separate property of the wife, but the property in them remains in, and survives to, the wife.

If the husband survive the wife, it would seem that in respect of those chattels real over which a wife by the statute has a complete power of disposal as if she were a *feme sole*, if she die intestate without disposing of them, her husband has a right to them as her administrator, and to establish his title he must take out administration to her.

Having regard to the cases which may arise in the case of chattels real of the wife not affected by the Married Women's Property Act, 1882, it will be convenient to reprint in substance the text as it existed in the last edition of this Work prior to the passing of that Act.

(z) Women, however, married before 1 Jan., 1883, in addition to the powers conferred on them by this Act, still retain the same power to dispose of chattels real settled to their "separate use," or (if married on or after 9 Aug., 1870) of chattels real acquired by them as next of kin of an intestate, as they possessed at the commencement of this Act: see sects. 19 and 22.

(a) See *post*, p. 578 *et seq.*

*Law as to Chattels Real of the Wife not affected by the
Married Women's Property Act, 1882.*

As to the law previous to the passing of the Married Women's Property Act, 1870 and 1882, the common law gave a qualified interest to the husband in the chattels real of which the wife is, or may be, possessed during marriage, viz., an interest in his wife's right with a power of divesting her property during the coverture.

1. If therefore he so disposes of his wife's terms, or other chattels real, by a complete act in his lifetime, her right by survivorship will be defeated (b): but if he leave them *in statu quo*, and the wife be the survivor, she will be entitled to them, to the exclusion of the executors or administrators of her husband (c).

1. The right of the husband's executor, &c. to the wife's chattels real: if they remain *in statu quo*, and she survive, she will be entitled, and not her husband's executors: what amounts to a disposition of the wife's chattels real by the husband, so as to bar her right by survivorship:

It becomes, therefore, necessary to inquire what amounts to such a disposition of the wife's chattels real by the husband, as will exclude her title by survivorship: and as the object of this Treatise is merely to show what interest the executor or administrator of the husband takes by the defeat of the wife's claim, the instances selected will be confined to cases where the question is between her and the executor or administrator, and not between her and an alienee. The general principle is, that the transaction must be of a description to effect a complete alteration in the nature of the joint interest of the husband and wife in the wife's chattels real.

The Will of the husband cannot dispose of the chattels real of the wife, against her surviving him; for as that does not take effect till *after* his death, the law takes precedence,

the husband's Will does not:

(b) And since the same rule of property must prevail in equity as in law, if the wife in a case not affected by the Married Women's Property Acts be entitled to a term for years, held *in trust* for her benefit, the assignment or alienation of it by her husband will bind her surviving him: *Bates v. Dandy*, 2 Atk. 207; 1 Bac. Abr. Baron and Feme (C. 2); 1 Roper, Husb. and Wife, 177, 2nd edit.: unless the husband, before marriage, consent to the settlement of the term for her benefit: *Sir Edw. Turner's Case*, 1 Vern. 7. (See as to trusts for her separate use, *post*, Pt. II. Bk. II. Ch. II. § III.) So, apart from the Married Women's Property Acts, the contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband; and the wife surviving will be bound by such sale though the husband dies before the contingency is determined or the reversion falls into possession: *Donne v. Hart*, 2 Russ. & M. 360. *Secus*, where the interest cannot possibly vest during the coverture: *Duberley v. Day*, 16 Beav. 33.

(c) 1 Roper, Husb. and Wife, 173, 2nd edit.

and vests the term in the wife immediately upon his decease (*d*).

effect of husband's proceedings at law in his own name for the wife's term:

If the husband and wife be ejected of a term which he enjoyed in her right, and he commences an action of ejectment *in his own name*, and obtains judgment, the recovery will change the wife's property in the term, and vest it in the husband (*e*).

effect of husband's submitting the title to his wife's term to arbitration:

It seems that if there is a dispute between the husband, claiming a term of years in right of his wife, and another person, relative to the title, and they refer the matter to arbitration, and an award is made of the term to the husband, the property in it will be changed by the arbitrament, so as to amount to a reduction of the term into possession which will defeat the wife's right by survivorship (*f*).

effect of the husband taking a new lease of the land in which the wife has a term:

If the wife, at the time of her marriage, were a lessee for years, and her husband purchases or takes a lease of the lands for both their lives, that act will amount to a disposition of the term: because, by the acceptance of the second lease the term is surrendered by operation of law, which surrender the husband is enabled to make under his general authority to dispose of the wife's leases in possession (*g*).

effect of an alienation of wife's term by husband on a condition which is broken and the land re-entered:

If the husband alone assign a term of which he is possessed in right of his wife, *subject to a condition*, and enter for the condition broken during the coverture, the husband will be again possessed in right of his wife as before; and the wife being the survivor may be entitled (*h*).

But if the husband die before the condition broken, his executors or administrators must enter for the breach of the condition, and will hold discharged of the title of the wife (*i*).

effect of husband's mortgaging his wife's chattels real:

If the husband mortgages the wife's term, and by payment of the money at the day, the estate of the mortgagee ceases,

(*d*) 2 Black. Comm. 434; 1 Roper, Husb. and Wife, 174, 2nd edit.

(*e*) Co. Lit. 46, *b*; Com. Dig. Baron and Feme (E. 2); Bac. Abr. tit. Baron and Feme (C. 2); but see *Brett v. Cumberland*, 1 Roll. Rep. 359, in which Coke, C. J., says: "A man hath a term in right of his wife; he is ousted of it, and brings his action, and recovers the same again, and hath his judgment; he shall have it *in statu quo*." See also note (6) to Co. Lit. 46, *b*; Hal. MSS.

(*f*) 1 Roll. Abr. 245, Arbitrament (D.); but see Mr. Roper's note, vol. i. 185, 2nd edit., and *Hunter v. Rice*, 15 East, 100.

(*g*) 2 Roll. Abr. Surrender (F.), p. 495, pl. 8; 1 Roper, Husb. and Wife, 183, 2nd edit.

(*h*) 1 Roll. Abr. 344, l. 45—50; Bac. Abr. tit. Baron and Feme, (C. 2); 1 Prest. on Abstr. 345.

(*i*) Co. Lit. 46, *b*; Bac. Abr. tit. Baron and Feme (C. 2).

it seems that the interest of the wife in the term will not be affected (*k*). If the money be not paid at the day, the estate of the mortgagee becomes absolute at law, and the alienation of the term being complete at law, the wife's legal right by survivorship is defeated; and if the equity of redemption were reserved to the husband alone, it has been said that her right will also be defeated in equity, by analogy to the cases in which it has been held that she is bound by the husband's voluntary assignment of her equitable chattels real (*l*). But if the equity of redemption were reserved to the husband and wife, she would be entitled to survivorship (*m*): And unless his intention to defeat her right can be collected from the particular instruments of mortgage, it may be doubted whether it will be defeated by the reservation of the equity of redemption to him alone; for that this mere circumstance is not enough to rebut the ordinary presumption that nothing more is intended by the usual mortgage deed than that which is necessary to make the estate a security for the money advanced (*n*). If in any case the husband, after the estate of the mortgagee has become absolute, pays the money, and takes an assignment to himself, the property will be altered, and the term will go to the executors of the husband, to the exclusion of the wife (*o*).

The power which the law gives the husband to divest the whole interest of his wife, in her chattels real, necessarily authorizes him to divest it partially (*p*). If, therefore, the husband be possessed of a term for years in right of his wife, and he alone grants a lease for a portion of the term reserving rent, he becomes the actual owner, to the extent of the term so

effect of husband making a lease of the wife's term for years:

(*k*) *Young v. Radford*, Hob. 3; 1 Roper, Husb. and Wife, 184, Jacob's edit.

(*l*) 1 Roper, Husb. and Wife, 184, Jacob's edit.; 1 Prest. on Abstr. 345. The latter writer adds "*sed quære*."

(*m*) *Pitt v. Pitt*, 1 Turn. Chan. Rep. 180: In that case a *feme sole* made a mortgage of a leasehold house and afterwards married; the mortgage was then transferred; the husband joined in the transfer, and covenanted to pay the money; and the equity of redemption was reserved to the husband and wife, their executors, administrators, and assigns: It was held that the wife's right by survivorship was not affected: But on a bill by the wife to redeem the mortgage, the redemption was decreed on the terms, that the husband's estate should stand in the place of the mortgagee, for sums paid by him out of his property in reduction of the mortgage debt.

(*n*) *Clark v. Burgh*, 2 Coll. 221.

(*o*) 1 Prest. on Abstr. 346.

(*p*) Bac. Abr. tit. Baron and Feme (C. 2).

granted, and the rent will form part of his executor's estate (*q*); but the residue of the original term will belong to her, as undisposed of by her husband (*r*).

effect of husband's agreement for an underlease.

Whether the husband's *agreement* to make an underlease of his wife's term for years will produce the same effect as an actual lease, has never been expressly decided. The point was discussed in *Druce v. Denison* (*s*), though it became unnecessary to decide it: But Lord Eldon (*t*) intimated an opinion that the agreement would be good against the wife, and that the rent would form part of the husband's estate: He observed, that as to actual leases there was no doubt that, to the extent of the terms granted, the husband became owner; as to the agreements for leases his apprehension was, that in a Court of Equity the husband was to be considered owner of those interests, and he compared it to an assignment of the wife's choses in action, which, though conferring no legal title, is supported in equity (*u*).

2. Rights of wife's administrator to her chattels real: those vested during coverture go to the husband *jure mariti*:

2. The rights of the administrator of the wife to her chattels real when her husband survives. If the husband do not alien them in her lifetime, and he survive her, the law gave them to him, at least all those of which he had possession *jure uxoris* during the coverture, not as the administrator of his wife, but

(*q*) 6 Ves. 394, by Lord Eldon in *Druce v. Denison*; and see Platt on Leases, vol. i. p. 157. Had the husband and wife joined in the lease, the rent would have been incident to the reversion, as well after the death of the husband as during his life, and would have belonged to the wife: 1 Prest. on Abstr. 345; 1 Roper, Husb. and Wife, 174, 175, 2nd edit. Sect. 10 (1) of the Conveyancing Act, 1881, does not apply to the case referred to in the text, since the lease is an alienation by the husband in derogation of the wife's estate, and the rent is not incident to the reversion, for that the wife's reservation, and the wife shall not have it, for she comes in paramount. See *per* Crook, J., in *Blaxton v. Heath*, Poph. 145.

(*r*) Co. Lit. 46, *b*. The words of Lord Coke are "If a man be possessed of a term of forty years in the right of his wife, and maketh a lease for twenty years, reserving a rent, and die, the wife shall have the residue of the term; but the executors of the husband shall have the rent; for it was not incident to the reversion, for that the wife was not a party to the lease." See *post*, Pt. II. Bk. III. Ch. I. § III., as to the party entitled to arrears of rent reserved on a lease of the wife's estate.

(*s*) 6 Ves. 385.

(*t*) 6 Ves. 395.

(*u*) And see now Judicature Act, 1873, s. 25 (11), which enacts that the rules of equity shall prevail. And see *Walsh v. Lonsdale*, 21 C. D. 9; *Lowther v. Heaver*, 41 C. D. at p. 264; *Pugh v. Heath*, 7 App. Cas. at p. 237.

as a marital right (*x*). No administration to her, therefore, needed to be taken out by him for this purpose (*y*).

But to entitle the husband to the chattels real of the wife which were not vested in his possession in her right in her lifetime, he must make himself her representative, by becoming her administrator (*z*). *secus*, of those not vested.

If the husband be seised of an advowson in right of his wife, and the church become vacant during the coverture, the wife shall have the void presentation if she survive him, and the husband if he survive her (*a*), even though, by reason of her not having issue, he be not tenant by the curtesy (*b*): but if the church fell vacant *before* coverture, the husband shall not have the turn (*c*): *i.e.*, it may be considered, he shall not have it as a marital right; but still it will go to him as her administrator (*d*): It will be observed that the next presentations to vacant churches are not properly chattels real, but chattels personal, and, therefore, in strictness do not belong to this part of the subject of the estate of an executor or administrator.

(*x*) *Secus*, as to a lease whereof the wife and another were joint tenants; for it shall survive to her companion, inasmuch as he has the elder title to that of the husband: Co. Lit. 185, *b*; *Bracebridge v. Cook*, Plow. 416, 418. And if the husband in his lifetime had granted a rent-charge out of the term the wife survivor should avoid the charge and all other incumbrances, for she being the survivor is remitted to the term which the coverture does not divert out of her: *Bracebridge v. Cook*, Plow. 416, 418. And see *Re Butler's Trusts*, 38 C. D. 286.

(*y*) 1 Roll. Abr. Baron and Feme (H. 8); *Wrotesley v. Adams*, Plow. 122; *Hauchet's Case*, Dyer, 251, *a*; Co. Lit. 46, *b*; *Ibid.* 351, *a*; *Re Bellamy*, 25 C. D. 620. And the same of an equitable term: *Rex v. Holland*, Aleyn, 15, by Rolle; 1 Prest. on Abstr. p. 343.

(*z*) Co. Lit. 351, *a*. There is a distinction between a mere right of action and a case where the wife dies before the interest vested in possession. Thus where a wife was entitled to a term subject to a life estate therein and predeceased her husband during the subsistence of the life estate, it was not necessary for the husband to take out letters of administration in order to complete his title to the leaseholds: *Re Bellamy*, 25 C. D. 620. See also *Doe v. Polgreave*, 1 H. Black. 535.

(*a*) Co. Lit. 351, *b*.

(*b*) Wats. C. L. 71, 72.

(*c*) Co. Lit. 351, *b*.

(*d*) See *post*, Pt. II. Bk. III. Ch. I. § III.

SECTION III.

The Estate of an Executor or Administrator in Chattels Real by Condition, Remainder, or Limitation.

By condition. An executor or administrator may become entitled to chattels real by condition. As where a lease for years has been granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts as the testator appointeth, &c., and the condition is not performed after the testator's death, now is the chattel real come back to the executor (*e*). So where the condition is, that the testator or his executor shall pay the money to avoid the grant, as where he mortgaged a lease for years and before the day limited for redemption he dies, his executor is entitled to redeem at the time and place appointed (*f*).

By remainder. Likewise a chattel real may accrue to an executor or administrator by remainder. Thus a remainder in a term of years, though it never vested in the testator in possession, and though it continue a remainder, shall go to his executor. Where a lease for years is bequeathed by Will to A. for life, and afterwards to B., who dies before A., although B. never had the term in possession, yet it shall devolve on his executors (*g*).

Contingent and executory interests. With respect to contingent and executory interests, it is established, that contingent and executory estates, and possibilities in chattels real, accompanied by an interest, are transmissible to the personal representative of a person dying before the contingency upon which they depend takes effect (*h*). Thus, in the case above put, where a lease for years is bequeathed to A. for life, and after his death to B. for the residue of the term, B. has only an executory interest during the life of A.; but this interest is transmissible to B.'s executors or administrators (*i*).

Lease for life, remainder to the executors of lessee. Lord Coke says, that "if a man make a lease for life to one, the remainder to his executors for twenty-one years, the term of years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs

(*e*) Wentw. Off. Ex. 181, 14th edit.

(*f*) Wentw. Off. Ex. 181, 14th edit.; Toller, 164.

(*g*) Wentw. Off. Ex. 189, 14th edit.

(*h*) Fearn, 554; 2 Saund. 388, *n*, note (9), to *Purefoy v. Rogers*. See *post*, Pt. II. Bk. III. Ch. III.

(*i*) *Manning's Case*, 8 Co. 95; *Lampet's Case*, 10 Co. 46. And see Mr. Fraser's notes in his edition of Coke's Reports.

of A., the fee vested in A., as it had been limited to him and his heirs), even so are the testators and executors *correlativa* as to any chattel. And, therefore, if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors (k).

It has been several times laid down, that if a remainder be limited to a man's *executors and assigns*, as purchasers, there his administrator cannot take as assignee (l).

Administrator cannot take as assignee in a limitation to a man's executors and assigns, as purchasers.

(k) Co. Lit. 54, b. In some former Editions of this Work reference was made at length to the cases of *Sparke v. Sparke*, Cro. Eliz. 663; *Sparke v. Sparke*, Cro. Eliz. 840; *Cranmer's Case*, Dyer, 309; *Finch v. Finch*, Moor. 339; and *Remington v. Savage*, Moor. 745, together with the MS. note by Mr. Serjeant Hill in his copy of Viner in Lincoln's Inn Library, with a view to reconcile the conflicting decisions on this subject. It is not thought desirable to do more in the present Edition than to cite the conclusion arrived at by Mr. Serjeant Hill in his MS. note above referred to, in which he says: "On the whole the difference seems to be this, that if a lease be made for life or years, with a remainder to the executors of the lessee, it shall be a vested interest in the lessee, and, consequently, if he dies intestate shall go to his administrator. But if there be a lease for ninety-nine years, if the lessee live so long, with a proviso that if he die within the term it should be to his executors for forty years, this last term shall not vest in the lessee but in his executors by purchase, because it is a conditional limitation and a mere possibility to vest, for this is the point agreed in Cro. Eliz. 841. *Quære tamen* whether it would not now be considered as more than a possibility. See *Fearne*, 1617."

(l) See *Sparke v. Sparke*, Owen, 125; *Sparke v. Sparke*, Cro. Eliz. 840, 841.

CHAPTER THE SECOND.

THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR IN THE
CHATELS PERSONAL OF THE DECEASED IN POSSESSION.

What are
chattels
personal.

CHATELS personal are, properly and strictly speaking, things *moveable*; which may be annexed to, or attendant on, the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can be properly put in motion, and transferred from place to place (*a*). All these, and other things of the same nature, generally speaking, belong to the estate of the executor or administrator.

It is proposed to consider this subject in the usual divisions:
1. Chattels animate. 2. Chattels vegetable. 3. Chattels inanimate.

SECTION I.

*The Estate of an Executor or Administrator in Chattels
Animate.*

*Domitor
nature.*

Chattels animate may be subdivided into such as are domestic and such as are *feræ naturæ*. In such as are of a nature tame and domestic (as horses, dogs, kine, sheep, poultry, and the like), a man may have an absolute property, and they are therefore capable of being transmitted, like any other personal chattel, to his executor or administrator (*b*). In those of a wild

Feræ naturæ :

(*a*) 2 Black. Comm. 387, 388.

(*b*) 4 Burn, E. L. 297. It is said, indeed, in Swinburne, Pt. 7, s. 10, pl. 8, p. 929, 7th edit., and in Noy's Maxims, p. 107, that hawks and hounds shall go to the heir with the estate. But it seems clear at this day, that they would go to the executor or administrator as chattels personal. "And why not?" says the author of the Office of Executor (supposed to be Mr. Justice Doddridge), "for although hounds, greyhounds, and spaniels be for the most part but things of pleasure, that hindreth not but they may be valuable, as well as instruments of music, both tending to delight and exhilarate the spirits: a cry of hounds hath, to my sense, more spirit and vivacity than any other": Wentw. Off. Ex. 143, 14th edit.

nature, *i.e.*, such as are usually found at liberty and wandering at large, generally speaking, a man can have no property transmissible to his representatives (*c*).

But a qualified property may subsist in animals of the latter class, *per industriam hominis*, by a man's reclaiming them and making them tame by art, industry, or education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty (*d*), and the animals so reclaimed or confined belong to the executor or administrator. Thus, if the deceased have any tame pigeons, deer, rabbits, pheasants or partridges, they shall go to his executors or administrators: So though they were not tame, yet if they were kept alive, in any room, cage or such like place; as fish in a trunk (*e*). But if at any time they regain their natural liberty, the property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning (*f*). A qualified property may also subsist in animals *feræ naturæ propter impotentiam*; as in young pigeons, who though not tame, being in the dove-house, are not able to fly out; and they shall go to the executors or administrators (*g*).

property *per industriam* in animals *feræ naturæ* goes to executors:

property *propter impotentiam* in them.

The animals which a man has *ratione privilegii* are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator. Thus deer in a park (*h*) (*i.e.*, as it should seem, in a park properly so called, which must be either by grant or prescription) (*i*), conies in a warren, doves in a dove-house, will not go to the executor or administrator (*k*). And the reason assigned by Lord Coke is, because, without them, the inheritance would be incomplete. Another and more obvious reason mentioned by Lord Coke in the same case is, that the deceased had not any property in them (*l*).

What animals are incident to the inheritance and shall not go to the executor:

Deer in a park:
Conies in a warren:
Doves in a dove-house

(c) 2 Black. Comm. 390, 391.

(d) *Ibid.* 390.

(e) Wentw. Off. Ex. 143, 14th edit.

(f) 2 Black. Comm. 392.

(g) Wentw. Off. Ex. 143, 14th edit.

(h) Co. Lit. 8, a; Wentw. Off. Ex. 127, 14th edit.

(i) *Davis v. Powell*, Willes, 46, in which case it was held, that deer in an enclosed ground, in which deer had been usually kept, and which was therefore called a park, might be distrained for rent. And it has been held that deer in an ancient and legal park may be so tame as to pass to executors as personal property: *Morgan v. Earl of Abergavenny*, 8 C. B. 768; *Ford v. Tynte*, 2 John. & H. 150. A tenant for life of deer is bound to keep up the herd: *Paine v. Warwick*, [1914] 2 K. B. 486.

(k) Com. Dig. Biens (B.), Wentw. Off. Ex. 127, 14th edit.

(l) The case of swans, 7 Co. 17, b. But though animals *feræ naturæ* are not, while living, the personal chattels of the owner of the soil,

Fish :

So, if a man buys fish, as carps, bream, tenches, &c., and puts them into his pond, and dies, in this case the heir who has the water shall have them, and not the executors; but they shall go with the inheritance; because they were at liberty and could not be gotten without industry, as by nets and other engines (*m*), otherwise (as it has already been said) (*n*), if they are in a trunk, or in a net, or the like; for then they are severed from the soil (*o*).

but if the
deceased was
termor for
years, the
deer, fish, &c.
go to the
executor :

But if the deceased has only a term for years in the lands in which the park, warren, dove-house, or pond is situate, the deer, conies, doves, and fish will go to the executor or administrator as accessory chattels, following the estate of their principal, viz., the park, warren, dove-house, or pond (*p*). It must, however, be understood, that the executor or administrator can have no further interest than the deceased had in them, *i.e.*, a right to take to his own use as many as he pleases, during his term, provided he leaves enough for the stores; for if a lessee for years of a park, vivary, warren, or dove-house, kills so many of the deer, fish, game, or doves, that there is not sufficient left for the stores, it is waste (*q*), and will be equally waste in his executor or administrator.

SECTION II.

The Estate of an Executor or Administrator in Chattels Vegetable.

What grow-
ing things
shall go to
the heir :

Personal effects of a vegetable nature are the fruit or other parts of a plant or tree, when severed from the body of it, or the whole plant or tree itself, when severed from the ground (*r*).

yet if they are found and killed on the land by a trespasser, the qualified property in them *ratione soli* becomes absolute in the owner of the soil: *Blades v. Higgs*, 12 C. B. N. S. 501; 13 C. B. N. S. 844: Affirmed in Dom. Proc., 11 Jurist, N. S. 701. As to bees, see 2 Black. Comm. 393. In *Hannam v. Mockett*, 2 B. & C. 944, Bayley, J., says, that bees are property, and are the subject of larceny. The reader is also referred on these matters generally, to the Treatise on the Law of Eixtures, &c., p. 167 *et seq.*, by Messrs. Amos and Ferard, from which excellent work the author derived great assistance in compiling this and the following part of the present book.

(*m*) Co. Lit. 8, *a*.

(*n*) *Ante*, p. 539.

(*o*) Bac. Abr. tit. Executors (H. 3), vol. iii. 64.

(*p*) Wentw. Off. Ex. 127, 14th edit.; Godolph. Pt. 2, c. 13, s. 4.

(*q*) Co. Lit. 53, *a*.

(*r*) 2 Black. Comm. 389.

But unless they have been severed, trees, and the fruit and produce of them, from their intimate connexion with the soil, follow the nature of their principal, and therefore, when the owner of the land dies, they descend to his heir, and do not pass to his executor or administrator (*s*). Hence apples, pears, and other fruits, if hanging on the trees at the time of the death of the ancestor, shall go to his heir, and not to his executor or administrator (*t*). So it is of hedges, bushes, &c.; for all these are the natural or permanent profit of the earth, and are reputed parcel of the ground whereon they grow.

Trees and fruit not severed:

Some cases, however, exist, where even growing timber trees, are, owing to special circumstances, considered as chattels, and as such will pass to the executor or administrator. Thus, if tenant in fee simple grants away the trees they are absolutely passed from the grantor and his heirs, and vested in the grantee; and if the latter should die before they are felled, they will go to his executor or administrator: for in consideration of law, they are divided as chattels from the freehold (*u*). So where tenant in fee simple sells the land and reserves the trees from the sale, the trees are in property divided from the land, although, in fact, they remain annexed to it, and will pass to the executors or administrators of the vendor (*x*). But if the person so entitled to the trees distinct from the land, afterwards purchases the inheritance, the trees will be re-united to the freehold in property, as they are *de facto*, and descend to the heir (*y*). Yet if the tenant in fee simple lease the land for years, excepting the trees, and afterwards grants the trees to the lessee, they are not by this means re-annexed to the inheritance, but the lessee has an absolute property in them, which will go to his executors or administrators (*z*).

certain cases where growing trees go to the executor:

So if tenant in tail sells the trees to another, they are a chattel in the vendee, and his executors or administrators shall have them; and in such case also, *fictione juris*, they are severed from the land; but if the tenant in tail dies *before actual severance*, as to the issue in tail, they are part of his inheritance, and shall go

(*s*) Swinb. Pt. 7, s. 10, pl. 8; *Re Ainslie*, 30 C. D. 485.

(*t*) Swinb. Pt. 7, s. 10, pl. 8; Wentw. Off. Ex. 146, 147, 14th edit.; *Rodwell v. Phillips*, 9 M. & W. 501.

(*u*) *Stukeley v. Butler*, Hob. 173; Wentw. Off. Ex. 148, 14th edit.; Com. Dig. Biens (H).

(*x*) *Herlakenden's Case*, 4 Co. 63, b; Wentw. *ubi supra*.

(*y*) 4 Co. 63, b; *Anon.*, Owen, 49.

(*z*) 4 Co. 63, b.

with it, and the vendee or his executor cannot take them (*a*). The law, it may be presumed, is the same with respect to the vendee of a tenant in tail after possibility of issue extinct, or a tenant for life without impeachment of waste (*b*). And it seems that Equity would not afford relief (*c*).

when trees,
&c., that are
severed go to
the executor.

With respect to the property in trees and bushes when severed, there seems to be a material difference between such trees as, by the general law of the land, or by the custom of the country where they grow, are timber, and such as are not. For if tenant in dower, or by the curtesy, or tenant for life or years, unless he be so without impeachment of waste, cuts down timber trees, or a stranger does so, or the wind blows them down, the trees so severed shall not go to the tenant, or to his executor, but to the owner of the first estate of inheritance in the land (*d*). On the other hand, if such a tenant cuts down hedges or trees, not timber, or they are severed by the act of God, the tenant shall have them (*e*): and, consequently, his executor or administrator. So if trees are blown down, which are in their nature

(*a*) *Liford's Case*, 11 Co. 50, *a*: for, it was said, timber trees cannot be felled with a goose quill.

(*b*) *Pyne v. Dor*, 1 T. R. 55; *Bishop of London v. Webb*, 1 P. Wms. 528.

(*c*) See Treat. on Equity, B. 1, c. 4, s. 19, that no act of tenant in tail shall be carried into execution in a Court of Equity, any further than at law; for this would be to repeal the statute *de donis*.

(*d*) *Herlakenden's Case*, 4 Co. 63, *a*; *Bewick v. Whitfield*, 3 P. Wms. 268; in which case Lord Chancellor Talbot said, that this was so decreed upon the occasion of the great windfall of timber on the Cavendish estate. So if tenant for life without impeachment of waste commits equitable waste by cutting ornamental timber: *Lushington v. Boldero*, 15 Beav. 1; *Ormonde v. Kynnersley*, *ibid.* 10. But a tenant for life, though subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber trees cut by order of the Court of Chancery, on account of their being in a decaying state, by reason of standing too thickly: *Tooker v. Annesley*, 5 Sim. 235; *Consett v. Bell*, 1 Y. & Coll. C. C. 569. As to the rights of tenant for life and remainderman with respect to timber cut down or blown down and to thinnings, see *Honeywood v. Honeywood*, L. R. 18 Eq. 306; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Re Trevor-Batye*, [1912] 2 Ch. 339; and see also Settled Land Act, 1882, ss. 28 (2), 29, 35.

(*e*) Com. Dig. Biens (H); *Berryman v. Peacock*, 9 Bingh. 384. A testator devised estates on which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales. The Court of Appeal held that, having regard to the maxim *quicquid plantatur solo, solo cedit*, the principle applicable was that, if a tree was attached to the soil, it was real estate, and if severed, personalty: that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree: *Re Ainslie*, 30 C. D. 485.

timber, but are dotards without any timber in them (*f*), or if such are wrongfully severed by the lessor, they belong to the tenant, and will pass to his executors (*g*).

There are, however, certain vegetable products of the earth, Emblements: which, although they are annexed to and growing upon the land at the time of the occupier's death, yet, as between the executor or administrator of the person seised of the inheritance, and the heir, in some cases, and between the executor or administrator of the tenant for life, and the remainderman or reversioner, in others, are considered by the law as chattels (*h*), and will pass as such. These are usually called emblements.

The vegetable chattels so named, are the corn and other growth of the earth, which are produced annually, not spontaneously, but by labour and industry, and thence are called *fructus industriales*. When the occupier of the land, whether he be the owner of the inheritance or of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature and dies before harvest time, the law gives to his executors or administrators the profits of the crop, *Emblavence de bled*, or emblements, to compensate for the labour and expense of tilling, manuring, and sowing the land (*i*). The rule is established as well for the encouragement of husbandry and the public benefit (*k*), as on the consideration, in the case of tenant for life, that the estate is determined by act of God, and that the maxim of law is, *actus Dei nemini facit injuriam* (*l*).

(*f*) *Herlakenden's Case*, 4 Co. 63, a. b.; *Countess of Cumberland's Case*, Moore, 812.

(*g*) *Channon v. Patch*, 5 B. & C. 897.

(*h*) They are in fact not only in this respect, but in most others, looked upon as chattels: for the rule seems now to be established, that all those vegetables which go to the executor, and not to the heir, are for most purposes considered mere chattels. They may consequently be seized and sold under a *fiat fieri facias*; and the sale of them while growing is not a contract, or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the 4th section of the Statute of Frauds: but a sale of goods, wares, and merchandise, within the 17th section: See the judgments of Bayley and Littledale, JJ., in *Evans v. Roberts*, 5 B. & C. 829; and of Hullock, B., in *Scoroll v. Boxall*, 1 Younge & Jerv. 398. See also *Jones v. Flint*, 10 A. & E. 753. Growing crops, if separately assigned, are personal chattels within the Bills of Sale Acts, 1878 and 1882.

(*i*) Swinb. Pt. 7, s. 10, pl. 8.

(*k*) 2 Black. Comm. 122.

(*l*) By Lord Hardwicke, in *Lawton v. Lawton*, 3 Atk. 16.

to what
produce the
doctrine of
emblemments
extends:
corn, hemp,
flax, saffron,
&c.:
melons: hops:
potatoes:
not to fruits
growing.
or young trees
planted:

nursery
grounds, &c.:

The doctrine of emblemments extends not only to corn and grain of all kinds, but to every thing of an artificial and annual profit, that is produced by labour and manurance (*m*): as hemp, flax, saffron, and the like (*n*); and melons of all kinds (*o*); and hops also, although they spring from old roots, because they are annually manured, and require cultivation (*p*); and so of potatoes (*q*).

But the rule does not apply (as it has already appeared) to fruit growing on trees (*r*): nor to the plantation of trees: for the general rule is, *quicquid plantatur solo, solo cedit*; and when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to him in future, and to future successions of tenants (*s*). Therefore, if a man sow the land with acorns, or plant young fruit trees, or oak, elm, ash, or other trees, these cannot be comprehended under emblemments (*t*). The case of trees, shrubs, and other produce of their grounds planted by gardeners and nurserymen, with an express view to sale, may be mentioned as an exception; for they are removable by them or their executors, as emblemments are (*u*).

(*m*) Co. Lit. 55, *b*.

(*n*) *Ibid.*; Wentw. Off. Ex. 147, 14th edit.

(*o*) Wentw. Off. Ex. 153, 14th edit. The author of that book expresses his opinion, that artichokes go to the heir, as they have not that yearly setting or manurance as should sever them in interest from the soil: *Ibid. sed quære*.

(*p*) The authorities, however, do not prove that the person who planted the young hops, or his personal representatives, will be entitled to the first crop, whenever produced: *Graves v. Weld*, 5 B. & Adol. 105, 120. As to teasles, see *Kingsbury v. Collins*, 4 Bing. 202.

(*q*) *Evans v. Roberts*, 5 B. & C. 832, by Bayley, J. It is said in Godolphin, Pt. 2, c. 14, s. 1, that things under ground, whether in gardens or elsewhere, as carrots, parsnips, turnips, or skerrets, shall go to the heir; and the same is said in Wentw. Off. Ex. 152, 14th edit., on the principle that the executors could not reach them without digging and breaking the soil. But Lord Coke says, that if the tenant plant roots, his executors shall have that year's crop: Co. Lit. 55, *b*; and it seems at this day it would be so holden. See 2 Black. Comm. 123.

(*r*) *Ante*, p. 541.

(*s*) Gilb. Ev. 210; 2 Black. Comm. 123.

(*t*) Co. Lit. 55, *b*.

(*u*) *Penton v. Robart*, 2 East, 90, in Lord Kenyon's judgment: *Lee v. Risdon*, 7 Taunt. 191, in the judgment of Gibbs, C. J.: and see the remark of Lawrence, J., in 3 East, 44, note (*c*). But where a tenant, not being a nurseryman by trade, makes a nursery for fruit trees, for the purpose of transplanting to the orchards, he has no right to sell them: by Heath, J., in *Wyndham v. Way*, 4 Taunt. 316. Lord Ellenborough held at Nisi Prius, that it was waste for an outgoing tenant of garden ground to plough up strawberry beds in

The growing crop of grass, even if sown from seed, and ^{grass:} though ready to be cut for hay, cannot be taken as emblements; because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation (x). It seems, however, that the artificial grasses, ^{artificial grasses:} such as clover, saint-foin, and the like, by reason of the greater care and labour necessary for their production, are within the rule of emblements (y).

But the doctrine of emblements extends to a crop of that ^{second year's crops.} species only which ordinarily repays the labour, by which it is produced, within the year in which that labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period (z). In *Graves v. Weld* (a), the tenant for a term determinable upon a life sowed the land in spring, first with barley and soon after with clover: The life expired in the following summer: In the autumn the tenant mowed the barley, together with a little of the clover plant, which had sprung up: The clover so taken made the barley-straw more valuable, by being mixed with it: but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown: The reversioner came into possession in the winter, and took two crops of the same clover, after more than a year had elapsed from the sowing: It was held that the tenant was not entitled to emblements of either of these two crops: first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the *cesser* of his interest, this had been already taken by him at the time of cutting the barley.

full bearing, although when he came in he paid for them at a valuation: *Wetherell v. Howells*, 1 Campb. 227. And it was held in *Empson v. Soden*, 4 B. & Adol. 655, that a tenant (not a gardener by trade) cannot remove a border of box planted by himself on the demised premises: And in this case Littledale, J., denied that the tenant could remove flowers which he had planted.

(x) Gilb. Ev. 215, 216. See also *Evans v. Roberts*, 5 B. & C. 829, 832, in the judgment of Bayley, J.

(y) 4 Burn, E. L. 299. No case seems to have occurred where these matters have come in question. The general right seems to have been admitted in *Graves v. Weld*, *ubi supra*.

(z) *Graves v. Weld*, 5 B. & Adol. 105, 118.

(a) 5 B. & Adol. 105.

In what cases
the executor
is entitled to
emblemments:
as against
the heir:
as against
dowress:
as against
joint-tenant:

Where the deceased was seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir (*b*): though not as against a dowress (*c*). So if the deceased was seised in fee tail, his executor or administrator is entitled to the privilege as against the heir in tail (*d*). But where a man is seised of the soil as joint-tenant, and dies, the corn, &c., sown, goes to the survivor, and the moiety shall not go to the executors or administrators of the deceased (*e*): Yet if a joint-tenant agree that his companion shall occupy and sow all the land, who sows and dies before severance, his executors shall have the emblements (*f*).

It must be observed, however, that if a man seised in fee sows the land and then conveys it away, and dies before severance, the crops will not go to the executor of him who has conveyed away the land, but will pass with the soil as appertaining to it (*g*).

as against
devisee:

In like manner, the executor of a tenant in fee does not enjoy the right to emblements as against a devisee; for if the land itself is devised, the growing crops pass to the devisee, and the executor is excluded (*h*). And though the devise was made before sowing, and the deviser afterwards sows, and dies before severance, the devisee shall have them, and not the executor (*i*). So, if the testator, being seised in fee, sows the land, and devises it to A. for life (without any remainders over), and the testator and A. both die before severance, the executors of A. shall have the crop, though A. did not sow (*k*). This rule is founded upon a presumption that it is the will of the testator, that he who takes the land should take the crops which belong to it; because every man's donation shall be taken most strongly against himself (*l*).

(*b*) *Lawton v. Lawton*, 3 Atk. 16.

(*c*) See *post*, p. 549.

(*d*) Wentw. Off. Ex. 145, 14th edit.

(*e*) The reason for this is that joint tenants are supposed to carry on the cultivation of the soil by a joint stock, and in all joint stock, except merchants', there is a survivorship: *Gilb. Ev.* 212, 213; but see *ante*, p. 495 *et seq.*

(*f*) *James v. Portman*, Owen, 102.

(*g*) *Gilb. Ev.* 214.

(*h*) *Cooper v. Woolfitt*, 2 H. & N. 122.

(*i*) *Com. Dig. Biens* (G. 2).

(*k*) *Spencer's Case*, *Winch.* 51; *Co. Lit.* 55, *b*, note (2), from *Hal. MSS.*

(*l*) *Gilb. Ev.* 214. On the same ground, if a man seised in fee sows copyhold lands, and surrenders them to the use of his wife, and dies before the severance, the wife shall have the corn, and not the execu-

However, this distinction between the heir and devisee, though fully established, is mentioned by Lord Ellenborough, in *West v. Moore* (m), as capricious enough. And the presumption may be rebutted by words in the Will, that show an intent that the executor shall have the emblements (n). Thus where the testator devised certain estates to A. in fee, and to his executors all his money, &c., stock upon his farm, with the implements of husbandry, and all other his personal estate of what nature or kind soever, in trust, to pay debts and legacies, &c., it was held that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death from the devisee of the land to the executors; although there were assets sufficient to pay all the debts and legacies without that aid (o). So where there is expressly a legatee of the growing crops, or any specific bequest in the Will which can apply to emblements, they will vest in the executor, and after his assent, in the specific legatee (p).

The privilege of taking the emblements is by no means confined to the case of the representatives of a person seised of the inheritance, as against the heir; but the rule is general, that every one who has an uncertain estate or interest, if his estate

tors of the husband; for this is a disposition of the corn, being appurtenant to the land: 1 Roll. Abr. 727, pl. 18; Gilb. Ev. 214.

(m) 8 East, 339, 343.

(n) 8 East, 343, by Lord Ellenborough.

(o) *West v. Moore*, 8 East, 339; *Cox v. Godsalve*, 6 East, 604, note; *Blake v. Gibbs*, 5 Russ. 13, *in notis*; *Rudge v. Winnall*, 12 Beav. 357; *Re Roose*, 17 C. D. 696. See also Godolph. Pt. 3, c. 21, s. 14, that by a bequest of "Movables" the industrial fruits of the ground will pass. But in *Vaisey v. Reynolds*, 5 Russ. 12, Sir John Leach, M. R., held that a gift of "all farming stock" will not pass crops on the ground as between a particular and residuary legatee, and that learned judge observed that in *Cox v. Godsalve* and *West v. Moore*, the devisee was excluded rather because the executor was plainly meant to take the whole personal estate than from the mere force of the words "stock on my farm." This case was, however, fully discussed by Sir George Jessel, M. R., in his judgment in *Re Roose, ubi supra*, and disapproved by him. After citing the older cases he comments upon the distinction drawn by Sir J. Leach between *Vaisey v. Reynolds*, and those older cases, and says: "All I can say is, having 'read the case before Lord Ellenborough' (*West v. Moore*), 'I think Sir John Leach made a mistake. Lord Ellenborough says 'stock upon my farm' in so many words passes the growing crops, 'showing that those were the words he relied upon. I am, therefore, 'of opinion that the distinction taken by Sir John Leach between 'those two cases' (*West v. Moore* and *Cox v. Godsalve*), 'and the 'case before him' (*Vaisey v. Reynolds*), 'is quite untenable.'"

(p) *Cox v. Godsalve*, 6 East, 604, note to *Crosby v. Wadsworth*.

Right of
executor of
tenant for life
to emble-
ments.

determines by the act of God before severance of the crop, shall have the emblements, or they shall go to his executor or administrator (*q*). Therefore, the executor or administrator of a tenant for life is entitled to emblements to the exclusion of the remainder-man or reversioner: because in this case the estate of the tenant is determined by the act of God (*r*). So if tenant for years, *si tamdiu vixerit*, sows, and dies before severance, his executor shall have the corn, for the uncertainty of the determination of his estate (*s*).

But there may be a case where the executor of the tenant for life has no right to emblements, on account of the deceased not having been the actual party who sowed the land, and the consequent failure of the reason upon which the right is founded. Thus if A., seised of land, sows it and then conveys it or devises it to B. for life, remainder to C. for life, and B. dies before the corn is reaped, in this case B.'s executors shall not have the emblements, but they shall go with the land to C. (*t*). And it has been said that if A. seised in fee, sows lands and conveys it to B. for life, remainder to C. for life, and

(*q*) Com. Dig. Biens (G. 2).

(*r*) Co. Lit. 55, *b*. Where the *landlord* is tenant for life, and by his death the estate of his tenant at rack-rent is determined, it is enacted by stat. 14 & 15 Vict. c. 25, s. 1, that "instead of claims "to emblements, the tenant shall continue to hold till the end of "the then current year, and the new owner of the land shall be "entitled to a proportion of the rent." Where H. held, as tenant from year to year, of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, and partly sown with corn and planted with potatoes, and A. died in the middle of a year of H.'s tenancy, and M. thereupon became entitled to the reversion: and at the expiration of the then current year of H.'s tenancy, distrained for the proportion of the rent due since the death of A., it was held that the Act applied to all tenancies in respect of which there might be a claim to emblements; that, but for the Act, there might have been a substantial claim to emblements here, and that the premises were, therefore, "a farm or lands" within sect. 1; and it was also held that that section gave a right to distrain for the rent, as well as to recover it by action: *Haines v. Welch*, L. R. 4 C. P. 91.

(*s*) 1 Roll. Abr. Emblements (A.), pl. 12, p. 727.

(*t*) *Grantham v. Hawley*, Hob. 135. So if a man sows land and lets it for life, and the lessee for life dies before the corn is severed, his executor shall not have it, but he in reversion. So if tenant for life sows the land, and grants over his estate, and the grantee dies before the corn is severed, *his* executor shall not have it: by Popham and Gawdy, Justices in *Knevett v. Pool*, Cro. Eliz. 464. But if the devise be to B. for life, without remainders over, and B. dies before severance, the executor of B. shall have the corn, though B. did not sow: *Winch*. 51 Co. Lit. 55, *b*, note (2), from Hal. MSS.; *ante*, p. 547.

both B. and C. die before severance, the crop shall not go to the executors of either B. or C., but revert to A. (*u*).

If a disseisor sow the land of tenant for life, and the tenant for life die, the executors of the tenant for life shall have the corn, and not the disseisor, nor he in reversion (*x*).

The executors or administrators of the incumbent of a benefice would probably at common law be entitled to the emblements of the glebe lands; for the deceased had an uncertain interest in the land, which was determined by the act of God. The right, however, is fully established by the statute 28 Hen. VIII. c. 11, which provides and enacts, that in case any incumbent happens to die, and before his death hath caused any of his glebe lands to be manured and sown at his own proper costs and charges with any corn or grain, that then in that case every such incumbent may make his testament of all the profits of the corn growing upon the said glebe so manured and sown (*y*).

Right of executors of clergy to emblements of the glebe.

If the successor be inducted before the severance of the emblements from the ground, the successor shall have the tithe thereof; for although the executor represents the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted (*z*): Otherwise, if the parson dies after severance from the ground, and before the corn is carried off (*a*).

If the husband sows the ground, and dies, and the heir assigns the land sown to the wife for her dower, she shall have the crop, and not the executors of the husband: for she shall be in *de optimâ possessione viri*, above the title of the executor (*b*). It was with reference to this especial privilege of a dowress, that at common law she could not, according to the more general opinion, devise corn which she herself had sown, nor did it go to her executors or administrators (*c*); but by the Statute of

Dowress and her executors, when entitled to emblements.

(*u*) Hobart, 132, *in margine*. Gilb. Ev. 215: but see the preceding note.

(*x*) *Knevett v. Pool*, Gouldsb. 146, by Popham & Fenner.

(*y*) This statute has been repealed, but the repeal probably does not affect the rights of the representative of an incumbent. A person who resigns his living is not entitled to emblements: *Bulwer v. Bulwer*, 2 B. & A. 470. The general rule of law is, that the tenant shall not have emblements when the tenancy is determined by his own act; as where the lessee surrenders, or a woman who is tenant *durante viduitate* marries, or the estate determines by forfeitures, condition broken, &c.: Com. Dig. Biens (G. 2); *Davis v. Eyton*, 7 Bingh. 154. Cf. *Leschallas v. Woolf*, [1908] 1 Ch. 641.

(*z*) 1 Roll. Abr. 655.

(*a*) Wats. C. L. 513, 4th edit.; 3 Burn, El. 415, 8th edit.

(*b*) 2 Inst. 81.

(*c*) Bract. lib. 2, fol. 96; 2 Inst. 81.

Merton, 20 Hen. III. c. 2, the representatives of a tenant in dower, like those of any other tenant for life, are entitled to emblements (*d*).

Executor of a husband of dowress.

If tenant in dower sows the land, and takes husband, who dies before severance of the corn, the dowress shall have the crops, and not the executor of the husband.

Executor of a man seised in right of his wife.

With respect to the executor of a man seised in right of his wife, the rule is, that if he sow and die before severance, his executors shall have the emblements (*e*). And if husband and wife are joint tenants for life, and the husband sows, and the land survives to the wife, it is also said that she shall have the corn (*f*).

Executor of husband and wife are joint tenants.

The executor or administrator of a jointress, like a tenant in dower, is entitled to emblements of the estate settled in jointure; but she is not entitled to them at her husband's death to the exclusion of her husband's executors, as a dowress is (*g*).

Right of executor of a jointress to emblements.

Right of executors of tenant by the curtesy.

Upon the death of a tenant by the curtesy, like any other tenant for life, the emblements of the estate held by the curtesy will go to his executors or administrators (*h*).

Right of executor of tenant at will to emblements.

A tenancy at will (in the strict sense of the expression) is determined by the death of the lessee, and his executor or administrator will be entitled to the emblements (*i*).

Entry, egress, and regress, to take the emblements.

When there is a right to emblements, the law gives a free entry, egress, and regress, as much as is necessary, in order to cut and carry them away (*k*). But the emblements do not give a title to exclusive occupation; and it is doubted in Plowden's queries (*l*), whether the executors of a lessee for life shall not

(*d*) See Com. Dig. Biens (G. 2), that the statute was only in affirmance of the common law. If two be tenants in common of land in fee, and one of them takes a wife, and dies, and the wife is endow'd, &c., and she and the other tenant in common sow the land, &c., and afterwards she makes her executors, and dies, the corn not being severed, now her executors shall have the corn in common with him who held in common with the tenant in dower: Perk. s. 523.

(*e*) Co. Lit. 55, *b*; Swinb. Pt. 3, s. 6, pl. 11, 253, 7th edit. All questions, however, of the right of the executor of a husband to the emblements of his wife's land are comparatively unimportant since the passing of the Married Women's Property Act, 1882: for since that Act a husband can in no case be entitled in right of his wife except where the marriage took place and the title to the property accrued before Jan. 1st, 1883.

(*f*) Co. Lit. 55, *b*; Dyer, 316.

(*g*) *Fisher v. Forbes*, 9 Vin. Abr. tit. "Emblements," pl. 82, p. 373.

(*h*) 1 Roper, Husband and Wife, 35, 2nd edit.

(*i*) Co. Lit. 55, *b*.

(*k*) Co. Lit. 56, *a*. See *Hayling v. Okey*, 8 Exch. 531, 545.

(*l*) 29th Query.

pay rent for the land till the corn is ripe: though, perhaps, says that author, the executors of tenant in fee simple shall have the corn without paying for it (*m*).

Under the Agricultural Holdings Act, 1883, now repealed, the executors of a landlord tenant for life, who had been compelled under the Act to pay compensation for improvements to an outgoing tenant who had claimed compensation, and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they had so paid (*n*).

Right of executors of tenant for life to charge holding with compensation paid under 46 & 47 Vict. c. 61, s. 29.

Besides emblements, a tenant on quitting his holding at the determination of his tenancy is entitled under the Agricultural Holdings Act, 1908, to obtain from his landlord compensation for improvements, and the right to receive such compensation enures (by s. 48) for the benefit of his personal representatives.

Agricultural Holdings Act, 1908.

SECTION III.

The Estate of an Executor or Administrator in Chattels Personal Inanimate.

As to chattels personal inanimate: All these pass to the executor and administrator: and although any one of them should be specifically bequeathed to a legatee, it will not vest in him till the executor has assented.

It is necessary, however, to attend to three instances in which the right of the executor or administrator to the chattels personal inanimate of the deceased is barred, to some extent, in favour of certain special claimants: 1. Heir-looms, and things in the nature thereof, in respect of the heir or successor. 2. Fixtures, in respect of the heir or devisee, or in respect of the remainderman or reversioner. 3. Paraphernalia and the like, in respect of the widow.

What chattels personal inanimate do not pass to the executor.

1. *Heir-looms and things in the nature thereof.*

It is proposed to consider, 1, Heir-looms and things of the same nature, from which the executor or administrator is excluded in favour of the heir or successor. Heir-looms are such goods and personal chattels as go *by special custom* to the

1. Heir-looms:

(*m*) See *Evans v. Roberts*, 5 B. & C. at p. 840. Such an interest does not constitute part of the realty.

(*n*) *Gough v. Gough*, [1891] 2 Q. B. 665.

heir along with the inheritance, and not to the executor or administrator of the last proprietor. The termination "loom" is of Saxon original, in which language it signifies a limb or a member: so that heir-loom is nothing else but a limb or member of the inheritance (*o*). An heir-loom is also called "principalium," a chief or principal, and "hæreditarium" (*p*).

what they are
strictly:

Brooke says (*q*), that heir-loom is those things which have continually gone with the capital messuage, by *custom*, which is the best thing of every sort, as of beds, tables, pots, pans, and such like of dead chattels moveable. And Lord Coke says (*r*), that heir-loom is due by *custom*, and not by the common law, and that the heir may have an action for them at common law, and shall not sue for them in the Ecclesiastical Court. Also in Spelman's Glossary (*s*), an heir-loom is defined to be "omne utensile robustius quod ab ædibus non facile revellitur, ideoque ex *more quorundam locorum* ad hæredem transit tanquam membrum hæreditatis." And in Les Termes de la Ley (*t*) (a book of great antiquity and accuracy) (*u*), an heir-loom is described to be "any piece of household stuff (ascun parcel des utensils d'un mease) which, *by the custom* of some countries, having belonged to a house for certain descents, goes with the house (after the death of the owner) unto the heir and not to the executors." Hence it seems to follow, that an heir-loom, in the strict sense of the word, can only go to the heir by force of a custom, and that in its nature it is a chattel distinct from the freehold. Yet Blackstone (*x*) says that heir-loom is "generally such things as cannot be taken away without damaging or dismembering the freehold"; and Lord Holt is reported to have said at Nisi Prius, that goods in gross cannot be an heir-loom, but they must be things fixed to the freehold, as old tables, benches, &c. (*y*); which proposition is not only adverse

must go to
the heir by
custom:

(*o*) 2 Black. Comm. 427. But in *Byng v. Byng*, 10 H. of L. at p. 183, Lord Cranworth, on the authority of Johnson and Webster, said, he believed the more correct explanation of the word is, that it is an old Anglo-Saxon word signifying goods or chattels. According to either derivation, it must mean something which, though not by its own nature heritable, is to have a heritable character impressed on it.

(*p*) Bro. Discent. pl. 43; Co. Lit. 18, *b*.

(*q*) Discent. pl. 43.

(*r*) Co. Lit. 18, *b*.

(*s*) Voce, Heir-loom.

(*t*) See Treat. on Fixtures, 162.

(*u*) Per Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. 229.

(*x*) 2 Comm. 427.

(*y*) Lord Petre v. Heneage, 12 Mod. 520.

to the authorities above cited, with regard to an heir-loom being a detached chattel, but is also liable to the objection that the heir would not then take it by custom, but as a thing annexed to the freehold at common law. Moreover, in the report of *Lord Petre v. Heneage*, by Lord Raymond (z), Lord Holt merely says, "a jewel cannot be an heir-loom, but only things ponderous, as carts, tables, &c." (a), which agrees with the above definition by Spelman, "omne utensile *robustius*." *semble*, must be of a ponderous nature.

The custom which entitles the heir must be strictly proved (b.)

The ancient jewels of the Crown are heir-looms, and shall descend to the next successor (c). Crown jewels.

If a man be seised of a house, and possessed of divers heir-looms that by custom have gone with the house from heir to heir, and by his Will deviseth away the heir-looms, and leaves the house to descend to his heir, this devise is void (d); for Littleton says, "the Will takes effect after his death, and by his death the heir-looms, by ancient custom, are vested in the heir, and the law prefers the custom before the devise." And Lord Coke, in another place observes, that the ancient jewels of the Crown, being heir-looms, are not devisable by testament (e). So Lord Macclesfield in *Tipping v. Tipping* (f), said, "I take it, *bona paraphernalia* are not devisable by the husband from the wife, any more than heir-looms from the heir" (g). Yet, during his life, the owner may sell or dispose of them, as he may of the timber of the estate (h). Heir-looms are not devisable:

but are alienable by the ancestor in his lifetime.

Besides heir-looms, properly so called, there are other instances of inanimate personal chattels, which the law gives to the heir, as part of his inheritance, and which may be considered as Chattels in the nature of heir-looms:

(z) Vol. i. p. 728.

(a) And Blackstone, in an earlier part of his Commentaries, vol. ii. p. 17, says, "an heir-loom or implement of furniture, which by custom descends to the heir together with a house, is neither land nor tenements, but a mere moveable."

(b) 2 Black. Comm. 428.

(c) Co. Lit. 18, b.

(d) Co. Lit. 185, b; Williams' Personal Property, 15th edit. 128; *Pusey v. Pusey*, 1 Vern. 273. This has, however, been doubted: Woodd. Vin. Lect. vol. ii. p. 380.

(e) Co. Lit. 18, b.

(f) 1 P. Wms. 730.

(g) See also to the same effect, 2 Black. Comm. 420; Com. Dig. Biens (B.).

(h) 2 Black. Comm. 429. It has been said that the king may dispose of the ancient crown jewels by patent: *Lord Hastings v. Sir Archibald Douglas*, Cro. Car. 344, by Berkeley and Jones.

monuments,
coat-armour,
&c., &c., set
up in honour
of deceased:

chattels in *the nature* of heir-looms. Thus monuments, coat-armour, the sword, pennons, and other ensigns of honour set up in memory of the deceased, shall go to the heir of the deceased, as heir-looms in the manner of an inheritance (*i*); and it matters not that they are annexed to the freehold of the church, albeit that is in the parson (*k*). But the property of the shroud and coffin remains in the executors or other person who was at the charge of the funeral: and it may be laid to be theirs, in an indictment for stealing them (*l*).

coffin and
shroud:

Collar of S. S.
and garter.

So though a testator devise all his jewels, &c., to his wife, yet his garter and collar of S. S. shall go to his heir, in the way of heir-looms (*m*).

ancient horn:

cornage, an ancient horn may go along with the inheritance, as an heir-loom (*n*).

Journals of
the House of
Lords:

In the case of *Upton v. Lord Ferrers* (*o*), a question was raised, whether the executor, or the heir-at-law of a peer of Parliament having succeeded to the peerage, was entitled to the Journals of the House of Lords, which are delivered to peers; The Master of the Rolls (Sir R. P. Arden) did not determine the point; but intimated an opinion that the heir-at-law was entitled, observing that a bishop gives a receipt for the journals of his see: and upon the death of a peer, the subsequent volumes only are delivered to the next lord.

Charters and
deeds belong-
ing to the in-
heritance go
to the heir,
and not to
the executor:

Charters or deeds relating to the inheritance are considered so much to savour of the realty, that the law for some purposes does not account them to be chattels (*p*), but provides, that they shall follow the land to which they relate, and shall vest in the heir, as incident to the estate, to the exclusion (but subject now to the Land Transfer Act, 1897) of the executor or adminis-

(*i*) *Corven's Case*, 12 Co. 105. See *Stubs v. Stubs*, 1 Hurlst. & C. 257, as to the heir's right to an exemplification of a grant of arms from the Herald's College.

(*k*) Co. Lit. 18, *b*; 1 Gibs. Cod. 544; 2 Black. Comm. 429.

(*l*) 2 Russell on Crimes, 5th edit. 256. If the executor lays a grave-stone on the testator in the church, and sets up coat-armour, and the vicar or parson removes them or carries them away, an action on the case lies for either the executor or the heir: Godb. 200, by Coke: *i.e.* (*semble*) if they were originally set up with a faculty: *Seager v. Bowle*, 1 Add. 541; and see *Spooner v. Brewster*, 3 Bingh. 136.

(*m*) *Earl of Northumberland's Case*, Owen, 124.

(*n*) *Pusey v. Pusey*, 1 Vern. 273.

(*o*) 5 Ves. 801.

(*p*) By a grant of *omnia bona et catalla*, charters concerning the land shall not pass: Perks, s. 115; Touchst. 97, 98.

trator (*q*). So far has the doctrine of charters and other written assurances concerning the realty not being chattels been carried, that larceny could not have been committed of them at common law, the taking of them being considered (as of other things which were part of the freehold) merely as a trespass and not a felony (*r*). The very box or chest which has usually been employed for keeping them partakes of their nature, and goes to the heir, and not to the executor (*s*); and of that also, at common law, no larceny could have been committed (*t*). Some writers have taken a difference, that the executor shall have the chest unless it be shut or sealed (*u*). But the weight of authorities seems against any such distinction, and in favour of the heir's general right (*x*).

so of the box
in which they
are kept:

But this rule applies to those deeds and writings only which relate to the freehold and inheritance; for such as regard terms for years, goods, chattels, or debts, belong to the executor or administrator (*y*).

Personal property may also be bequeathed or limited in strict settlement to devolve with lands to one for life, with remainder to the sons and daughters entitled to the lands in tail, so as to be transmissible like heir-looms (*z*). Thus a testator may devise or limit in strict settlement an estate and capital mansion, together with personal property, as the plate, pictures, library, furniture, &c., therein, such plate, &c., to be enjoyed, together with the house and estate, unalienable by the devisees in succession, as far as the law will allow. But the chattels, whether trustees be interposed or not, will be the absolute property of

Chattels
settled or
devised as
heir-looms.

(*q*) Godolph. Pt. 2, c. 14, s. 1; Wentw. Off. Ex. 153, 14th edit.; Co. Lit. 6, *a*, where Lord Coke calls them the *sinews* of the land.

(*r*) 2 Russell on Crimes, 141. But this defect of the common law was remedied by stat. 7 & 8 Geo. IV. c. 29, s. 23, which, however, has been repealed: and now by stat. 24 & 25 Vict. c. 97, s. 28, whosoever shall steal or for any fraudulent purpose destroy, cancel, obliterate or conceal the whole or any part of any document of title to lands, shall be guilty of felony: 2 Russell, 5th edit. 220.

(*s*) Godolph. Pt. 2, c. 14, s. 1; Wentw. Off. Ex. 156, 14th edit.; Com. Dig. Biens (B.).

(*t*) An action will, however, lie at common law for detinue or trover of title deeds.

(*u*) Swinb. Pt. 6, s. 7, pl. 5.

(*x*) Godolph. Pt. 2, c. 14, s. 1; Wentw. Off. Ex. 156.

(*y*) Wentw. Off. Ex. 153, 14th edit.; Bac. Abr. tit. Exors. (H. 3). If the writings of an estate are pawned or pledged for money, they are considered as chattels in the hands of the creditor, and in case of his decease, they will go to his personal representatives as the party entitled to the benefit accruing from the loan: Touchst. 469.

(*z*) Co. Lit. 18, *b*, note (109), by Hargrave.

the first adult person seised in tail, and on his death devolve on his executors or administrators; and be conformable to all the other rules concerning executory devises, so that the property cannot be rendered unalienable longer than lives in being and twenty-one years afterwards (a).

If the chattels, however, which are intended to go as heirlooms, are merely subject to the same limitations as the real estate limited in strict settlement, they will vest absolutely in the first tenant in tail, though he should die within an hour after his birth, and will go to his personal representative: Hence as the real estate in that event passes over to the next remainderman, a separation between the two properties ensues. It has been a subject of much discussion whether this would be obviated by a mere direction that the chattels shall go together with the land, "for so long a time as the rules of law and equity will permit." But the point, it should seem, must now be considered as settled, that this must be treated as a direct and not as an executory gift, and that, consequently, the absolute interest in the chattels would nevertheless vest in the first tenant in tail (b). The rule can only be modified so as to exclude a tenant in tail who dies under twenty-one or before coming into actual possession, by words indicating such an intention with reasonable certainty, and in considering whether the testator has manifested such an intention the court ought not to be influenced by the actual events which have occurred (c). In order, therefore, to prevent the separation, it is usual, after subjecting the chattels to the same limitations as the freehold

(a) Co. Lit. 18, b, note (109), by Hargrave; *Carr v. Lord Errol*, 14 Ves. 478.

(b) *Scarsdale v. Curzon*, 1 John. & Hem. 40; *Harrington v. Harrington*, L. R. 3 Ch. 564; L. R. 5 H. L. 87; *Christie v. Gosling*, L. R. 1 H. L. 279; *Holmesdale v. West*, L. R. 3 Eq. 474; *Holloway v. Webber*, L. R. 6 Eq. 523; *Shelley v. Shelley*, L. R. 6 Eq. 540; *Re Exmouth*, 23 C. D. 158; *Re Cresswell*, 24 C. D. 102; *Re Johnston*, 26 C. D. 538; *Re Cornwallis*, 32 C. D. 388. In the case of *Shelley v. Shelley*, *ubi supra*, which was a case of an executory trust, it was held by Wood, V.-C., that the objection, if any, to limiting personal estate as heirlooms where there is no real estate to guide the limitations does not apply to the case of family jewels, and the trust was decreed to be executed. Subject to the rule against perpetuities, chattels may be settled to follow the devolution of a dignity. A dignity or title of honour, as an incorporeal hereditament, is "land" within the meaning of sect. 37 of the Settled Land Act, 1882, and therefore chattels settled to go along with such dignity may be sold under this section: *Re Rivett-Carnac*, 30 C. D. 136; *Re Earl of Aylesford*, 32 C. D. 162. And see *Hill v. Hill*, [1897] 1 Q. B. 483, 490, *per* Chitty, L. J.

(c) *Re Parker*, [1910] 1 Ch. 581, distinguishing *Re Chesham*, [1909] 2 Ch. 329.

which they are to accompany as heir-looms, to add a declaration, that they shall not vest absolutely in the tenant in tail by purchase until twenty-one, or death under that age, leaving issue inheritable under the entail (*d*).

Lord Eldon, in *Clarke v. Lord Ormonde* (*e*), said that heir-looms are a kind of property that are rather favourites of the Court:—and that, although no testator can in any way exempt any part of his personal estate from applicability to the payment of his debts, nor can he put into the hands of his executors the means of defending themselves at law; yet where a testator makes a Will, providing that certain portions of his effects shall be treated as heir-looms, it is the duty of the executors, as far as possible, to preserve those parts of his property, and unless compelled, they ought not to apply them to the payment of debts (*f*).

Executors ought not to apply them unnecessarily to the payment of debts.

In the case of a corporation sole, as a bishop or parson, the general rule is, that chattels cannot go in succession: and there has already been occasion to point out a strong instance of this doctrine, viz., that though a lease for years be made to a bishop and *his successors*, yet it will go to his executors (*g*). But there are some exceptions (not only in cases of choses in action, which will hereafter be examined, but) in cases of chattels personal, which shall go to the successor of a corporation sole in the manner of heir-looms. Thus it has been held, that the ornaments of the chapel of a preceding bishop belong to the succeeding bishop, and are merely in succession (*h*). So if an incumbent enter upon a parsonage-house in which are hangings, grates, iron backs to chimneys, and such like, not put up there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but they shall continue in the nature of heir-looms; but if the last incumbent fixed them there only for his own convenience, it seems they shall be deemed as furniture, or household goods, and shall go to his executor (*i*).

Chattels which go to the successor of a corporation sole in the manner of heir-looms.

(*d*) Jarman on Wills, 6th edit. 693. See also *Potts v. Potts*, 1 H. of L. 671, for an example of a limitation of chattels under which they do not vest in the tenant in tail on his birth. See further the observations of Wood, V.-C., on this case in his judgment in *Lord Scarsdale v. Curzon*, *ubi supra*, where all the previous cases are fully and most ably reviewed; *Re Atkinson*, [1916] 1 Ch. 91.

(*e*) 1 Jacob, 114, 115.

(*f*) 1 Jacob, 108.

(*g*) *Ante*, p. 521.

(*h*) *Corven's Case*, 12 Co. 105, 106.

(*i*) 4 Burn, E. L. 304, 8th edit.

2. Fixtures.

Fixtures.

II. Fixtures, from which the executor or administrator is excluded in respect of the heir or devisee, or in respect of the remainderman or reversioner. When personal inanimate chattels are affixed to the freehold, they are usually denominated fixtures (*k*); and the questions concerning them, which form the present subject of inquiry, have arisen in the nature of exception to the general rule of law with regard to chattels in their condition, viz., *quicquid plantatur solo, solo cedit*, i.e., whatever is affixed to the realty is thereby made parcel of it, and partakes of all its incidents and properties (*l*).

General rule,
quicquid plan-
tatur solo, solo
cedit.

What is an
annexation of
a chattel to
the freehold:

It will perhaps be convenient to consider in the first place, what is such an annexation to the freehold as will bring a chattel within the general rule: and then to proceed to inquire, in what cases the rule is relaxed with respect to an executor or administrator.—In order to constitute such an annexation it is necessary that the article should be let into or united to the land, or to substances previously connected therewith. It is not enough that it has been laid upon the land, and brought into contact with it: The rule requires something more than mere juxtaposition; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground (*m*). As an illustration may be men-

(*k*) The word “fixture” is here used to convey the idea simply of annexation to the freehold: which sense of the term is the most easy of adaptation to the present Treatise. For general purposes, the definition given in the work of Amos and Ferard (3rd edit. by Ferard & Roberts, p. 2) is certainly the most convenient and scientific, viz., “fixtures are those personal chattels which have been annexed to land and which may be afterwards severed and removed by the party who has annexed them against the will of the owner of the freehold.” The general question of the origin and extent of the doctrine of “fixtures” was fully discussed in the case of *Bishop v. Elliott*, 10 Exch. 496; *S. C.*, in Cam. Scacc. 11 Exch. 119.

(*l*) See the judgment of Lord Hardwicke, C., in *Dudley v. Warde*, Ambl. 113, and of Lord Ellenborough, in *Elwes v. Maw*, 3 East, 51; *S. C.*, 2 Smith's Leading Cases. This rule is always open to variation by agreement of parties: *Wood v. Hewett*, 8 Q. B. 913.

(*m*) Amos & Ferard on Fixtures, 3rd edit. p. 3; *Wilde v. Waters*, 16 C. B. 637. But in *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382, 396, Lord Romilly, M. R., held, speaking of certain carved figures and sculptured marble vases, that it did not depend on whether any cement was used for fixing those articles, or whether they rested by their own weight; but upon this: whether they are strictly and properly part of the architectural design for the hall and staircase itself, and put in there as such, as distinguished from mere ornaments to be afterwards

tioned the case of *Culling v. Tuffnall* (n) before Treby, C. J., at Nisi Prius, where it was holden that the tenant, who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not *fixed it in or to the ground*, might take it away at the end of his term (o). On the other hand, where the tenant had erected a verandah, the lower part of which was attached to posts which were fixed in the ground, Abbot, J., held that the tenant could not remove any part of it (p). In the case of *R. v. Londonthorpe* (q), where a tenant had built on part of the land a post windmill constructed upon cross traces, laid upon brick pillars, but not attached or affixed thereto; the Court held, that the windmill was a mere chattel, and not to be considered as connected with the land (r). And generally, where the buildings are not let into the soil, but merely rest upon blocks or pattens, they continue mere chattels (s). It is obvious that, in similar cases, where it is a conclusion of fact that the connection with the soil does not amount to an actual annexation, the property continues in every respect a mere chattel, and will pass as such to the executors and administrators.

Moreover, the object and purpose of the annexation must be

added, and said that when they are so placed—as, for instance, they are in the cathedral of Milan—he should consider that they could not properly be removed, although they were fixed without cement or without brackets, and stand by their own weight alone: *Re Whaley*, [1908] 1 Ch. 615.

(n) Bull. N. P. 34.

(o) In Buller, it is said to have been holden, that he might do so by the custom of the country; but Lord Ellenborough, in adverting to the case (in *Elwes v. Maw*, 3 East, 55), observes, that the tenant might have done so without any custom; for the terms of the statement exclude the things from being considered as fixtures.

(p) *Penry v. Brown*, 2 Stark. N. P. C. 403. In this case the tenant had covenanted to repair and keep in repair the premises, and all the erections, buildings, and improvements which might be erected thereon during the terms and yield up the same in good and sufficient repair.

(q) 6 T. R. 377.

(r) So in *R. v. Otley, Suffolk*, 1 B. & Adol. 161, where a windmill which was made of wood, and had a foundation of brick; but the wood-work was not inserted in the brick foundation, but rested upon it by its own weight alone: No part of the machinery of the mill touched the ground or any part of the foundation: It was held that the windmill, not being affixed to the freehold, nor to anything connected with it, was not parcel of a tenement. Again in *Wansbrough v. Maton*, 4 A. & E. 884, it was held that a tenant was entitled, at the expiration of his term, to remove a barn which he had erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by its weight alone. See also *Wiltshear v. Cottrell*, 1 E. & B. 674.

(s) *Nayler v. Collinge*, 1 Taunt. 21.

regarded: For if a chattel be fixed to a building, merely for the more complete enjoyment and use of it *as a chattel*, it still, it should seem, remains a chattel, notwithstanding it is annexed to the freehold; and is never a part of it, any more than a carpet which is attached to the floor by nails for the purpose of keeping it stretched out: And on this principle, it was held, that cotton spinning machines, screwed into, and fixed firmly to, the floor, were chattels and distrainable for rent (*t*).

constructive
annexation.

But there may be a sort of constructive annexation of a chattel not actually affixed to the freehold: as if a man has a mill, and the miller takes a stone out of the mill, to the intent to pick it, to grind the better; although it is actually severed from the mill, yet it remains parcel of the mill, and will go to the heir: The same law of keys, and (in some sort) of doors, windows, rings, &c., which, although they are distinct things, shall go with the inheritance of the house (*u*). So the sails of a windmill are parcel of the freehold, and shall go to the heir, and not to the executor (*x*).

It has been laid down, that dung in a heap is a chattel, and goes to the executors; but if it lies scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold (*y*).

In what cases
executors are
entitled to
sever fixtures:

The second branch of the inquiry respecting fixtures remains to be investigated, viz., when chattels personal have been affixed to the freehold, and have thus lost their chattel character, under what circumstances the executor or administrator of the person who affixed them is entitled to sever them, and reduce them again to a state of personalty, so as to form part of the estate of the personal representative.

1. Right of
the executor
of tenant in
fee to fixtures
as against the
heir.

1. In the case as between the executor or administrator, and the heir of tenant in fee, the old rule of law above mentioned, "*quicquid plantatur solo, solo cedit*," obtained with more rigour

(*t*) *Hellawell v. Eastwood*, 6 Exch. 295; *Elliott v. Bishop*, 10 Exch. 508, 520. For cases in which chattels annexed to the freehold passed with the freehold, see *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Turner v. Cameron*, L. R. 5 Q. B. 306; *Mather v. Fraser*, 2 Kay & J. 549; *Walmsley v. Milne*, 7 C. B. N. S. 115; *Climie v. Wood*, L. R. 4 Ex. 328; *Ex parte Astbury*, L. R. 4 Ch. 630; *Sheffield and South Yorkshire Permanent Benefit Building Society v. Harrison*, 15 Q. B. D. 358; *Ellis v. Glover*, [1908] 1 K. B. 388.

(*u*) *Walmsley v. Milne*, 7 C. B. N. S. 138, *per* Crowder, J.

(*x*) *R. v. Crosse*, 1 Sid. 207, by Clench and Fenner, JJ. See also *ante*, p. 558, n. (*m*).

(*y*) *Yearworth v. Pierce*, Aleyn, 32. See *Higgon v. Mortimer*, 5 C. & P. 616.

in favour of the inheritance, and against the right to disannex therefrom, and consider as a personal chattel, any thing which had been affixed thereto; whereas, in the case as between the executors of tenant for life or in tail, and the remainderman or reversioner, the right to the fixtures was considered more favourably for the executors; and in the case as between landlord and tenant (which, although foreign to this Treatise, it will be necessary in some measure to contemplate) still greater latitude and indulgence has been allowed in favour of the tenant (*z*). It must, therefore, be observed, that an instance of the right allowed to a tenant as against his landlord, is not necessarily an authority for its allowance to an executor as against the heir, or perhaps even against the remainderman or reversioner; or that because the executor of tenant for life or in tail is entitled to certain fixtures, that the executor of tenant in fee will also be entitled (*a*). Speaking generally, however, there would seem to be no distinction in principle between any of the above-mentioned classes of cases, at all events as regards fixtures set up for ornament or domestic use or convenience, though there may in some cases be difficulty in applying the principle to the facts of the particular case. In the case of *Leigh v. Taylor* (*b*), Lord Halsbury, C., in the course of his speech says, "One principle, I think, has been established from the earliest period of the law down to the present time, namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house (*c*). That seems logical enough. Another principle

(*z*) *Elwes v. Maw*, 3 East, 51, in Lord Ellenborough's judgment. See also Lord Kenyon's judgment in *Penton v. Robart*, 2 East, 90, 91.

(*a*) In *Norton v. Dashwood*, [1896] 2 Ch. 497, 499, Chitty, J., says, "In regard to fixtures and a claim to remove them, the law has regard to the relation of the parties, and differs according to the nature of that relation. It will suffice to mention three sets of cases. As between landlord and tenant, the claim of the tenant to remove fixtures set up by himself is the most favoured; as between tenant for life and remainderman, the claim of the tenant for life to remove fixtures set up by himself is less favoured; and as between executor and heir, where both claim under the same owner, the claim of the executor to remove fixtures set up by the owner is still less favoured. In former times it has been said that the heir was a favoured person; but, in my opinion, no distinction can be maintained between a claim by the executor against the heir, and a claim by the executor against the devisee."

(*b*) [1902] A. C. 157, 158, distinguished in *Re Whaley*, [1908] 1 Ch. 615.

(*c*) In *Holland v. Hodgson*, L. R. 7 C. P. 328, 334, Blackburn, J., pointed out that the question of what constituted an annexation suffi-

appears to be equally clear, namely, that where it is something which, although it may be attached in some form or another (I will say a word in a moment about the degree of attachment) to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor. My lords, we have heard something about a suggested alteration of the law; but those two principles appear to have been established from the earliest times, and they are principles still in force. But the moment one comes to deal with the facts of each particular case, I quite agree that something has changed very much: I suspect it is not the law or any principle of law, but it is a change in the mode of life, the degree in which certain things have seemed susceptible of being put as mere ornament, whereas at an earlier period the ruder constructions rendered it impossible sometimes to sever the thing which was put up from the realty. If that is true, it is manifest that you can lay down no rule which will in itself solve the question; you must apply yourself to the facts of each particular case; and I am content here to apply myself to the facts of this case. Here are tapestries which, it is admitted, are worth a great deal of money. I put the case: suppose this had been a tenant from year to year, and she put up these things, is it conceivable that a person would for the purpose of a tenancy from year to year put up these things exactly in this way if thereby they made a present of 7,000*l.* to the landlord? That, I observe, startled Mr. Levett; he would not acquiesce in that; but in logic I am unable to sever the two sets of facts which I suggest. It is all very well to say that there is a difference between the cases of an heir and an executor on the one hand, and a landlord and a tenant on the other; but if you grant the proposition that it must depend upon the purpose of the annexation(*d*), and you must attend to the degree

cient to make the chattel part of the land must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. And see the judgment of Vaughan Williams, L. J., in *Leigh v. Taylor*, *sub nom. Re De Falbe*, [1901] 1 Ch. 523, 534; *Monti v. Barnes*, [1901] 1 K. B. 205.

(*d*) Vaughan Williams, L. J., in the Court of Appeal, in *Re De Falbe* (*ubi supra*, at p. 535), says, "In dealing with the question of fixtures

of the annexation (e), I am wholly unable to frame a hypothesis of a state of things in which these two principles will not decide the question, whether you are dealing with a landlord and tenant, or whether you are dealing with a tenant for life and a remainderman, or with people standing in any other relation to these things."

The rule as anciently established, between the executor and heir of tenant in fee seems to have had no exceptions; whatever was affixed to the freehold descended to the heir as parcel of the inheritance. "The law is the same," says Godolphin (f), "*concerning all things fastened to the freehold*, or to the ground by mortar or stone, as tables, dormants, leads, mangers, millstones, anvils, doors, keys, glass windows, and the like; for none of these be chattels, but parcels of the freehold, and, therefore, belonging to the heir, not the executor." So it is said in the Touchstone (g), "the incidents of a house, as glass windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables, dormants, furnaces of lead and brass, and vats in a brew and dye-house standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (although fastened to no wall), a copper or lead, fixed to the house, the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house." So it is laid down in Noy's Maxims (h), "all chattels shall go to the executors as vats and furnaces fixed in a brew-

Old rule between the executor and heir of tenant in fee.

it sometimes becomes material to consider the object and purpose of the annexation, by which I do not mean that there must be an inquiry into the motive of the person who annexed them, but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case."

(e) See *per* Vaughan Williams, L. J., in *Re De Falbe (ubi supra)*, where he says the quantum of fixture is important, but is not the only matter which has to be taken into consideration. One must ask oneself, is there any more fixing than was necessary for the enjoyment of the chattel as such? You might have to employ a mode of fixing which in many cases would be conclusive of an incorporation of the chattel with the freehold. But the moment you come to the conclusion that the mode of fixing which was employed was absolutely necessary for the enjoyment of the chattel, that inference does not arise.

(f) Pt. 2, c. 14, s. 1.

(g) P. 470.

(h) P. 51.

house or dye-house by the lessee; but if they be fixed by *tenant in fee*, the heir shall have them" (i).

Relaxations
with respect
to executor's
right, as
against the
heir, to trade
fixtures.

But in modern times relaxations of the rule have obtained; which may be considered, 1st, with respect to fixtures put up by the tenant in fee for the purposes of trade; and 2ndly, with respect to fixtures put up by him for ornament or domestic convenience. As to trade fixtures, the first instance of departure from the old rigour was in the case of a cyder-mill, before C. B. Comyns, at the assizes, at Worcester, where, upon an action of trover brought by the executor against the heir, the cyder-mill, though deep in the ground, and certainly affixed to the freehold, was held to be personal estate, and the jury were directed to find for the executor (k). This, in fact, is the only expressly decided case in favour of the right of the executor of tenant in fee to trade fixtures: although Lord Hardwicke, in *Lawton v. Lawton* (l), alluding to fire-engines set up in a colliery, said, "I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir:" and Lord Ellenborough, in his judgment in *Elwes v. Maw* (m), recognizes the principle of C. B. Comyns's decision. Its authority, however, has been denied in the House of Lords in *Fisher v. Dixon* (n); unless on the supposition that the cyder-mill in question was not annexed to the freehold (which it has always been assumed to have been in all the previous judicial discussions of the case). The case of *Fisher v. Dixon* has also negatived the doubt suggested by the *dictum* of Lord Hardwicke above cited: For it was there held by the House of Lords, that machinery affixed to the freehold by the owner in fee of certain land (purchased by himself) consisting of steam-engines, rails, and other fixtures, erected and used by him in the course of trade, for the purpose of working coal and iron mines in the land, went to his heir as part of his real estate. And several learned peers laid down that the principle on which a departure has been made from the old rule in favour

(i) See also Swinb. Pt. 6, s. 7, pl. 5; Wentw. Off. Ex. 149, 150, 151, 14th ed.; *Herlakenden's Case*, 4 Co. 64, a.

(k) *Ex relatione* Wilbraham, in 3 Atk. 14, *Lawton v. Lawton*. The decision was recognized by Lord Hardwicke in that case, and in *Lord Dudley v. Lord Warde*, Ambl. 114, and by Lord Ellenborough in *Elwes v. Maw*, 3 East, 54.

(l) 3 Atk. 15.

(m) 3 East, 54.

(n) 12 Cl. & F. 312, 325, 329, 331.

of trade has no application to a case between the heir and the executor (*o*).

This decision is in accordance with that of *Lawton v. Salmon* (*p*).

In *Trappes v. Harter* (*q*), the question was, whether the machinery, which was the subject of the action, passed to the mortgagee under a mortgage deed, or vested in the assignees under a commission of bankruptcy: Lord Lyndhurst, C. B., in delivering the judgment of the Court, observed that it was clear, as between landlord and tenant, it might be removed by the tenant, if put there by him: as between heir and executor, it would pass to the executor. His Lordship proceeded to observe, that, applying the authorities of *Lawton v. Lawton* and *Lawton v. Salmon* to the present case, the Court thought that this machinery, erected for the purposes of trade, in a neighbourhood where machinery of such description was commonly removed, and which was capable of removal without injury to the freehold, was not to be considered as belonging to the inheritance, but as part of the personal estate.

It seems to have been held, that the custom of the country may extend the rights of the executor beyond the rules above stated (*r*).

As to the right of the executor of tenant in fee to fixtures set up for ornament or domestic convenience, the first infringement of the strict rule in favour of the heir, with respect to fixtures of this sort, appears to be in *Squire v. Mayer*, Trin. Term, 1701, where it was held by Lord Keeper Wright, that a furnace, though fixed to the freehold and purchased with the house, and also the hangings nailed to the walls, should go to the executor and not to the heir; and so determined, says the report, contrary to *Herlakenden's Case* (*s*).

Relaxation with respect to executor's right, as against the heir, to fixtures put up for ornament or convenience: furnace: hangings:

The next case on the subject was *Cave v. Cave* (*t*), decided by pictures:

(*o*) See *post*, p. 568 *et seq.*; *Mather v. Fraser*, 2 K. & J. 536; *Walmsley v. Milne*, 7 C. B. N. S. 115; *Bain v. Brand*, 1 App. Cas. 762.

(*p*) 1 H. Black. 259, in note to *Fitzherbert v. Shaw*.

(*q*) 2 Crompt. & Mees. 153.

(*r*) Viner's Abr. tit. Executors (U.), 74. See also *Davis v. Jones*, 2 B. & A. 165.

(*s*) 2 Eq. Cas. Abr. 430.

(*t*) 2 Vern. 508. And see *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382 (*ante*, p. 558, n. (*m*)), and *Norton v. Dashwood*, [1896] 2 Ch. 497 (*ante*, p. 561, n. (*a*)). These two cases were discussed in *Re De Falbe*, [1901] 1 Ch. 523, where Stirling, L. J., says, "I cannot find that either Lord Romilly, M. R., or Chitty, J., said anything inconsis-

pier-glasses :

the same judge, in Trin. Term, 1705. The Lord Keeper was there of opinion, that "although pictures and glasses, generally speaking, are part of the personal estate, yet, if put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir: The house ought not to come to the heir maimed and disfigured: *Herlakenden's Case*: Wainscot put up with screws shall remain with the freehold."

But in *Beck v. Rebou* (u), determined in the subsequent year, a bill was filed in Chancery, upon a covenant made by a testator, to convey a house *and all things affixed to the freehold thereof*: The bill alleged that the defendant, the devisee in trust of the house, had taken away, among other things, the pier-glasses, hangings, and chimney-glasses, and it was urged for the plaintiff, that these hangings, pier-glasses, and chimney-glasses were as wainscot, being fixed with nails and screws to the freehold: that there was no wainscot under them; and as they would have gone to the heir and not the executor, *à fortiori*, they would go to the plaintiff who was as a purchaser of the house; and *Cave v. Cave* was cited: But Lord Keeper Cowper was of a different opinion; saying that hangings and looking-glasses were only matters of ornament and furniture, and not to be taken as part of the house or freehold (x).

ornamental chimney-pieces :

Lord Hardwicke in *Lord Dudley v. Lord Warde* (y), speaking of marble chimney-pieces, said, that as between landlord and tenant, they are removable by the latter, if erected by him, but this does not hold between the heir and the executor. They are removable, it would seem, not because they are marble, but because they are ornamental (z).

tapestry :

The cases of relaxation were followed by *Harvey v. Harvey* (a), in which it was held by C. J. Lee, at Nisi Prius, in

tent with the principle I have sought to apply in arriving at my judgment. . . . In other words, Lord Romilly inferred, from all the facts of that case [*D'Eyncourt v. Gregory*], that the tapestries were affixed as they were to the walls for the purpose of the improvement of the freehold, and not for the purpose of their enjoyment as chattels. It seems to me that *Norton v. Dashwood* is capable of a precisely similar explanation."

(u) 1 P. Wms. 94.

(x) In the case of *Birch v. Dawson*, 2 Ad. & Ell. 37, looking-glasses standing on chimney-pieces and nailed to the wall and a book-case standing on, but not fastened to, brackets and screwed to the wall, passed under a bequest of "fixtures and fixed furniture."

(y) Ambl. 113.

(z) *Bishop v. Elliott*, 11 M. & W. 113.

(a) 2 Stra. 1141. But not if the tapestry is so fixed as to be permanent: *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Norton v. Dash-*

trover by an executor against the heir, that hangings, tapestry, and iron backs to chimneys, belonged to the executor, who recovered accordingly against the heir. iron backs to chimneys:

The inference drawn from these decisions, by a writer of considerable accuracy (*b*), is this: The law seems now to be held not so strict as formerly, and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them: as tables, although fastened to the floor; furnaces, if not made part of the wall: grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise. tables, ovens, jacks, clock-cases.

On the other hand, the common law judges have, in several instances, incidentally stated the old rule as existing with scarcely any relaxation, between the executor and the heir. Thus, in *Winn v. Ingilby* (*c*), the question was, whether the sheriff had a right to take in execution, under a *fiery facias*, some fixtures, in a house which was the plaintiff's freehold, consisting of set pots, ovens, and ranges: The Court decided that the sheriff had no right: For these were fixtures which would go to the heir, and not the executor, and they were not liable to be taken as goods and chattels under an execution (*d*). So in *Colegrave v. Dias Santos* (*e*), which was trover for articles of three classes; the first admitted to be clearly annexed to the inheritance:—the second, consisting of stoves, cooling coppers, and blinds; and the third, not fixtures at all; Bayley, J., said, “The general rule relating to the right of fixtures, is that between the heir and the executor; and as between them, the second class of articles would belong to the heir.” In the same case, Abbott, C. J., said, “The rule of law is most strict between the heir and the executor: According to that rule, the articles in the first two classes would be considered as a parcel of the freehold.” And in *The King v. St. Dunstan* (*f*), where in a settlement case, the question was whether certain fixtures, consisting of a stove, cupboards, and grates (the stove Contrary dicta of judges in recent cases:
set pots, ovens, ranges:
stoves, cooling coppers, blinds:
stoves, grates, cupboards.

wood, [1896] 2 Ch. 497; *Re Whaley*, [1908] 1 Ch. 615. And see *Viscount Hill v. Bullock*, [1897] 2 Ch. 55, where the stuffed birds in a private museum were held removable, but not the cases in which they were contained.

(*b*) 4 Burn, E. L. 301, 8th edit.

(*c*) 5 B. & A. 625.

(*d*) See *Mather v. Fraser*, 2 K. & J. 550, *per* Wood, V.-C.

(*e*) 2 B. & C. 76.

(*f*) 4 B. & C. 686.

and grates fixed with brickwork in the chimney places, and the cupboards standing on the ground, and supported by holdfasts, and all removable without doing any injury to the freehold, except leaving a few marks of nails), were parcel of a demised tenement; the Court held that they were, and Bayley, J., said, "Although these fixtures, if they belonged to the tenant, might have been removed by him during the term, yet, as they actually belonged to the landlord, they were parcel of the freehold, and would have gone to his heir, and not to his executor."

It will be observed that most of the above cases are reconcilable on applying to the particular case the two principles enunciated by Lord Halsbury in *Leigh v. Taylor* above stated (*g*). It has, however, been doubted whether the executor as against the heir has any right of removal at all (*gg*).

2. To what fixtures an executor is entitled as against a devisee of tenant in fee.

2. It is now proper to view the subject of Fixtures as between the executor and the devisee of a tenant in fee. The general rule is, that a devisee shall take the land in the same condition as it would have descended to the heir: and consequently he will be entitled to all articles that are affixed to the land, whether the annexation takes place before or subsequent to the date of the devise: and as to those fixtures which the executor may claim against the heir, he would be equally entitled against a devisee (*h*). However, it will be recollected that in the analogous case of Emblements, while the heir is excluded in favour of the executor, the devisee has been held to be entitled to them upon the presumed intention of the testator (*i*).

There seems no doubt but that if, from the nature or condition of the property devised, it is apparent that the intention was that the fixtures should go along with the freehold to the devisee, they will pass to him, although they are of such a sort that the executor might have been entitled to them as against the heir. Thus, where the devise was of the testator's copyhold estates, which consisted, *inter alia*, of a brew-house and malt-

(*g*) [1902] A. C. 157, *ante*, p. 561.

(*gg*) *Re Chesterfield*, *infra*.

(*h*) Amos & Ferard on Fixtures, 3rd edit. 323. But see *Norton v. Dashwood*, [1896] 2 Ch. 497, 500, where Chitty, J., says: "In former times it has been said that the heir was a favoured person; but, in my opinion, no distinction can be maintained between a claim by the executor against the heir and a claim by the executor against the devisee." *Ante*, p. 561, n. (*a*).

(*i*) See *ante*, pp. 546, 547.

house, let on lease, together with the plant and utensils, it was held that the plant passed with the brew-house, on the ground that the testator intended to devise the plant as well as the shell of the brew-house; that without the plant, the walls would be of no use; and that it was material that the whole was, at the time of making the Will, in lease together (*j*).

In considering whether fixtures pass as part of the freehold, the Court is not bound, as between devisee or heir and executor, to apply the same principles as would govern its decision in the case of an issue as between tenant for life and remainderman or between landlord and tenant. Where a picture and tapestry had been fixed as part of a general scheme of decoration of a house and not for their better enjoyment as chattels, they passed under the devise of the house (*k*). The executor of a deceased owner in fee has no right to remove from the inheritance more than that which really and properly considered is never fixed to it in a definite way. Indeed, it has been doubted whether an executor, as against the heir, has any right of removal at all (*l*).

3. The subject now proceeds to the right to fixtures of the executor of tenant for life or in tail, as against the reversioner or remainderman: and the division employed in considering the right of the executor of tenant in fee will here be adhered to: viz., 1. The claim to fixtures set up by the particular tenant for purposes of trade. 2. The claim to fixtures set up by him for ornament or domestic convenience.

3. Right to fixtures of the executor of tenant for life or in tail as against remainderman:

Since the law is more indulgent in this respect to the executor of the particular tenant, than to the executor of the tenant in fee, it is clear that the authorities already mentioned which are in favour of the executor's right as against the heir are equally

(*j*) *Wood v. Gaynon*, 1 Ambl. 395. In the case of a conveyance of land by way of mortgage, as well as in that of a conveyance of any other description, all things annexed so as to become fixtures pass with the mortgaged premises as part of the mortgage security, and that though the deed contains no mention of fixtures. The Conveyancing Act, 1881, s. 6, enacts that a conveyance of land made after the commencement of the Act (1 Jan., 1882) "shall be deemed to include and shall by virtue of the Act operate to convey with the land all . . . fixtures." This was the law as established by decided cases. These cases, which since the above Act have become less material (except as to mortgages executed before 1 Jan., 1882), are set out in the 8th Edit. of this Work, p. 746, note (*i*).

(*k*) *Re Whaley*, [1908] 1 Ch. 615.

(*l*) *Re Chesterfield*, [1911] 1 Ch. 237.

as to trade
fixtures :

so in favour of it as against the remainderman or reversioner. In addition to these, there are cases, with respect to trade fixtures, in which the rights of the personal representatives of the tenant for life or in tail have been expressly considered. In *Lawton v. Lawton* (11), it was held that a fire-engine, set up for the benefit of a colliery, by the tenant for life, should be considered part of his personal estate, and go to his executor for the increase of assets in favour of creditors: And Lord Hardwicke, in giving his judgment, said: "It appears in evidence that, in its own nature, the fire-engine is a personal movable chattel, taken either in part, or in gross, before it is put up; but then it has been insisted, that fixing it, in order to make it work, is properly an annexation to the freehold.

"To be sure, in the old cases, they go a great way upon the annexation to the freehold; and so long ago as Henry the Seventh's time, the Courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the Courts have gone upon, of relaxing the strict construction of law, is, that it is for the *benefit of the public* to encourage tenants for life to do what is advantageous to the estate during their term."

In another part of his judgment, his Lordship observed: "It is true the old rules of law have indeed been relaxed, chiefly between landlord and tenant, and not so frequently between an ancestor and heir-at-law, or tenant for life and remainderman. But, even in these cases it does admit the consideration of *public conveniency* for determining the question.

"One reason that weighs with me is, its being a mixed case, between enjoying the profits of the land and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brew-houses, &c., of furnaces and coppers."

The judgment concludes with these observations: "It is very well known that little profit can be made of coal-mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainderman, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion."

The decision was followed by the case of *Lord Dudley v. Lord Warde* (m), which came before Lord Hardwicke a few years after *Lawton v. Lawton*, and was very similar in its circumstances. A bill was brought by the executor of tenant for life (or tenant in tail, for it did not appear which the testator was) against the remainderman of the estate, to have a fire-engine, which had been erected by the testator for a colliery, delivered up as part of the personal estate: and it was adjudged in favour of the executor: And his Lordship, in reference to the point decided in *Lawton v. Lawton*, says: "If it is so in the case of a tenant for life, *query*, how would it be in cases of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life. In the reason of the thing there is no material difference: The determinations have been from a consideration of the benefit of trade. A colliery is not only the enjoyment of the estate, but in part carrying on a trade. The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health, he would not erect such an engine, at a vast expense, unless it would go to his family."

These decisions of Lord Hardwicke have been frequently recognized in the common law Courts, viz., by Lord Mansfield, in *Lawton v. Salmon* (n), by Lord Kenyon, in *Penton v. Robert* (o), and by Lord Ellenborough, in *Elwes v. Maw* (p).

In *Re Hulse* (q) it was decided that the principle which as between landlord and tenant enables the latter to remove trade fixtures applies also to the case of tenant for life and remainderman, and allows the former or his personal representatives to remove machinery affixed by the tenant for life (q).

With respect to the right of the executor of tenant for life, as against the remainderman or reversioner, to fixtures set up for ornament, or domestic convenience; it is somewhat singular, that prior to the above-mentioned case of *D'Eyncourt v. Gregory* (r), not a single case is to be found in the books relating expressly to this subject. Nevertheless, upon the ground that the law is more favourable in this respect to the executor of tenant for life than to the executor of tenant in fee, it is clear, *à fortiori*, that all the cases which support the right

Right of executor of tenant for life, &c., to ornamental fixtures, &c.

(m) 1 Ambl. 113.

(o) 2 East, 91.

(q) [1905] 1 Ch. 406.

(n) 1 H. Black. 260, *in notis*.

(p) 3 East, 54.

(r) L. R. 3 Eq. 382.

of the latter to hangings, pier-glasses, tapestry, pictures, iron backs to chimneys, furnaces, grates, &c., are express authorities in favour of the right of the former; and further, that the strong expressions of judges in favour of the heir, which, in the cases heretofore mentioned, somewhat weaken the effect of the determinations in favour of the claims of the executor of tenant in fee, do not affect them with relation to those of the executor of tenant for life or in tail. It is now established by the decision of the House of Lords in *Leigh v. Taylor* (s) that chattels put up for ornamentation, and for the enjoyment of the person so fixing them while occupying the house, are not part of the house and can be removed by his executor.

4. Cases of
fixtures
between
landlord and
tenant.

4. With respect to the decisions between landlord and tenant, it has been so repeatedly laid down by the highest authorities that the right to fixtures is considered more favourably to the tenant, as against his landlord, than to the executors of tenant for life, or in tail (t), as against the remainderman or reversioner, that it would be wrong to conclude that a fixture set up for ornament or domestic convenience, by a tenant for life, &c., may be claimed as personalty by his executor, from the fact that it has been decided to be a removable fixture, as between landlord and tenant. However, it is asserted in a work, in which this subject has been very fully and ably treated (u), that it cannot, upon authority, be affirmed of any specific article, that it is removable as between landlord and tenant, but that it is *not* removable as between the tenant for life and the remainderman. And Lord Hardwicke seems to treat the two classes much in the same light, considering their claims to be founded on similar reasons: And although he says, that the case of a tenant for life is not quite so strong as that of a common tenant, yet many of his arguments are drawn from a close analogy between them (v).

But this is perfectly clear with regard to the decisions, as to fixtures, between landlord and tenant, that wherever it has been decided that fixtures are not removable by a common tenant, *à fortiori*, they are not removable by the executor of tenant for

(s) [1902] A. C. 157.

(t) *Penton v. Robart*, 2 East, 91; *Elwes v. Maw*, *ibid.* 51; *Grymes v. Boweren*, 6 Bingh. 439, 440.

(u) Amos & Ferard on Fixtures, 3rd edit. 175.

(v) *Ibid.*; and see *ante*, p. 569 *et seq.*

life or in tail, or the executor of tenant in fee. It will, therefore, be useful to point out some cases where the decisions have been against the right of removal by a common tenant.

It was decided in a celebrated case, after much deliberation, that the privilege established in favour of tenants in trade, does not extend to agricultural tenants, so as to entitle them to remove things which they have erected for the purposes of husbandry. In that case it was held that a tenant could not remove a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, nor fold-yard wall, erected for the use of his farm, *even though he left the premises exactly in the same state as he found them on his entry (x)*. Hence it followed that the executors of tenants for life or in tail, or in fee, were not entitled to remove, as trade fixtures, things erected for the purposes of agriculture.

Executors are in no case entitled to fixtures set up for agriculture:

But by the stat. 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant shall with the consent in writing of the landlord, erect any farm building or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture, they shall be the property of the tenant and removable by him after giving the landlord a month's notice in writing, unless the landlord elects to purchase them, in which case the value shall be ascertained by arbitration, as prescribed by the Act.

Stat. 14 & 15 Vict. c. 25, s. 3.

And this provision has been further extended to cases to which the Agricultural Holdings Acts, 1875 and 1883, respectively apply. The language of these Acts (38 & 39 Vict. c. 92, s. 53, and 46 & 47 Vict. c. 61, s. 34) is almost identical, and by them it is provided, that "where after the commencement of this Act a tenant affixes to his holding any engine, machinery, *fencing*, or other fixture, *or erects any building(y)*, for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed *or erected* in pursuance of some obligation in that behalf, or instead of some

Stats. 38 & 39 Vict. c. 92, s. 53, and 46 & 47 Vict. c. 61, s. 34.

(x) *Elwes v. Maw*, 3 East, 28.

(y) The words in italics are those which appear in sect. 34 of the Agricultural Holdings Act, 1883, but which do not appear in the corresponding section (53) of the Act of 1875, which Act the Act of 1883 repeals, reserving, however, any right in respect of fixtures affixed before 1 Jan., 1884: Sect. 62, *d*. See further the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 5; and see also the Tenants Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 2, giving compensation to tenants when mortgagee is in possession.

"fixtured or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy." Then follow certain provisos as to (1) payment of all rent due before removal: (2) the avoidance of or making good damage: (3) the giving of one month's previous notice in writing to the landlord: and (4) the option in the landlord to purchase such fixtures.

This section has now been replaced by sect. 21 of the Agricultural Holdings Act, 1908.

Executors not
entitled to
remove a
conservatory,
&c.

In *Buckland v. Butterfield* (z), a question arose whether a tenant for years had a right to remove a conservatory and pinery: Dallas, C. J., in delivering the judgment of the Court of Common Pleas, said, "Allowing that matters of ornament may or may not be removable, and that whether they are so or not, must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended, if such right were to be established in the present instance; and we agree with the learned judge who tried the cause (Mr. Baron Graham), in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste" (a). This case, therefore, is an authority that the executors of tenant for life, or in tail, or in fee, are not entitled to remove a conservatory such as is therein described (b).

Pumps.

In the case of *Grymes v. Boweren* (c), the question was respecting a tenant's right to remove a pump which he had erected on the demised premises at his own expense: It was attached to a stout perpendicular plank: this plank rested on the ground at one end, and at the other was fastened by an iron

(z) 2 Brod. & Bingh. 54.

(a) See also accord. *Jenkins v. Gething*, 2 Johns. & H. 520; in which case, Wood, V.-C., held that though greenhouses could not be removed, nor the boiler which had been built into the masonry, the pipes connected with screws were removable. It is expressly said by Lord Kenyon, in *Penton v. Robart*, 2 East, 90, that where hothouses and greenhouses, and the like, have been put up by nurserymen and gardeners at their own expense, such things might be taken away at the end of the term; but Lord Ellenborough, in *Elwes v. Maw*, speaking of that dictum, said, that there certainly existed no decided case, and he believed, no recognized opinion or practice on either side of Westminster Hall, to warrant such an extension. And Dallas, C. J., in the above case of *Buckland v. Butterfield*, seems to approve Lord Ellenborough's observation.

(b) See also *West v. Blakeway*, 2 M. & G. 729.

(c) 6 Bingh. 437.

bolt or pin to an adjacent wall, from which it was distant about four inches: The pin, which had a head at one end, and a screw at the other, passed entirely through the wall: The tube of the pump passed through a brick flooring into a well beneath: This well had originally been open, but the tenant had arched it over when he erected the pump: And in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed: Under these circumstances the Court of Common Pleas was of opinion, that the pump was removable as a tenant's fixture.

It may be observed that it has been decided, that a tenant must use his privilege in removing fixtures, *during the continuance of his term*: for if he forbears to do so within this period, the law presumes that he voluntarily relinquishes his claim in favour of his landlord (*d*). Hence it follows, that if a tenant from year to year of a house dies, and his executor or administrator gives a notice to quit, he should take care to remove the fixtures, or dispose of the right of the deceased to them, before such notice expires. In the case of a tenant for life, or in tail, his executor must, it should seem, remove the fixtures to which he is entitled within a reasonable time after the death of the testator.

The fixtures must be removed before the tenancy expires:

within a reasonable time, in the case of tenant for life.

In conclusion of the subject of the right of executors to fixtures generally, it may be observed, that, after all, the question whether fixtures be removable or not in a great measure depends on the individual circumstances of each particular case, with reference to the nature of the article, and the mode in which it is fixed (*e*). In the words of Lord Macnaghten in *Leigh v. Taylor* (*f*), "The question is still as it always was, has the thing

General conclusion as to the right to fixtures.

(*d*) *Lyde v. Russell*, 1 B. & A. 394. The tenant's right has been defined to continue during his original term, and such further period of possession by him, as he holds the premises under a right still to consider himself a tenant: *Mackintosh v. Trotter*, 3 M. & W. 186. In the absence of special contract, tenants' fixtures cannot be removed after the termination of the lease, and this rule applies, whether the lease determines by effluxion of time, or by re-entry on forfeiture: *Pugh v. Arton*, L. R. 8 Eq. 626.

In cases within the Agricultural Holdings Act, 1908, a tenant has a *reasonable time after the termination of the tenancy* to remove fixtures.

(*e*) By Tindal, C. J., in *Grymes v. Boweren*, 6 Bingh. 439. See also *Avery v. Cheslyn*, 3 A. & E. 75; *Walmsley v. Milne*, 7 C. B. N. S. 115.

(*f*) [1902] A. C. 157, 162. As to a mortgagee's title to fixtures as

in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times.”

3. *Separate Property, Paraphernalia, and other Rights of the Widow.*

3. Personal chattels inanimate in possession from which the executor or administrator is excluded in favour of the widow.

By reason of the Married Women's Property Act, 1882, all gifts made to a married woman on or after January 1, 1883, become her separate property as if she were a *feme sole*. Moreover, since that Act the old common law as to paraphernalia has ceased to exist (*g*). But inasmuch as questions may arise as to gifts to the wife, and separate property accruing to her before that date, it seems convenient to preserve in this Edition the statement of the law on this subject in the shape in which it appeared in the earlier Editions.

Marriage was formerly an absolute gift to the husband, as well of all the chattels of which the wife was actually and beneficially possessed at the time he married her (*h*), as also of such as came to her during marriage, whether she survived him or not (*i*). And consequently, though his wife outlived him,

against the owner under a hire-purchase agreement, see *Reynolds v. Ashby & Son*, [1904] A. C. 466.

(*g*) *Masson, Templier & Co. v. De Fries*, [1909] 2 K. B. 831, disapproving *Tasker v. Tasker*, [1895] P. 1.

(*h*) Co. Lit. 351, *b*. And there was no distinction in this respect between property to which the wife was entitled at Equity, and property to which she was entitled at Law, though in the former case the wife's equity to a settlement might arise: *Osborn v. Morgan*, 9 Hare, 432.

(*i*) These rules of law, however, had been considerably modified by the Married Women's Property Act (33 & 34 Vict. c. 93), which came into operation on the 9th day of August, 1870. By that Act (which, save in respect of accrued rights and liabilities, is repealed by the Married Women's Property Act, 1882), any married woman became absolutely entitled, independent of her husband, to—

a. Her earnings, made separately from her husband, and investments thereof (*s. 1*).

b. Government annuities and deposits in savings banks in her own name, whether before or after marriage (*s. 2*).

they went to his executor, if he made a Will, or to his administrator if he died intestate.

But by conveying her property to trustees for her separate use before marriage, the wife might, independently of the Married Women's Property Acts, preserve it, in cases clear of fraud on the marital rights of the husband, separate from her husband, and those claiming from or through him, both at law and in equity: for wherever the trust can be supported in equity, the trustee will be entitled at law (*k*). And if personal property was bequeathed to, or settled upon, a married woman for her separate use, even without the precaution of the intervention of trustees, the wife's separate interest was protected in equity by the conversion of her husband into a trustee for her (*l*); and consequently, upon his

Separate
property.

c. Sums invested in certain securities, companies, or societies (ss. 3, 4, 5), in respect of which the married woman had obtained the statutory order required by the Act.

d. Policies of insurance, and all benefits thereof, effected by her on her own life or her husband's for her separate use, if so expressed on the face of the policy (s. 10).

e. Any property hers before marriage, which her husband, by writing under his hand, had agreed with her should be her separate property after marriage (s. 11). And if married on or after the 9th of August, 1870, to—

f. Any personal property to which a woman shall become entitled during her marriage as next of kin or one of the next of kin of an intestate, or any sum not exceeding 200*l.* to which she shall after her marriage become entitled by deed or Will (sect. 7). Rents and profits of real property descending on any woman married after the passing of the Act as heiress or co-heiress of an intestate (sect. 8). In *Johnson v. Johnson*, 35 C. D. 345, it was decided that the 8th section of the Act does not enable a woman to pass by an unacknowledged deed the fee simple of real estate descended upon her. The words "shall become entitled" in these sections of this Act have been held to apply to a reversion falling in after marriage: *Lane v. Oakes*, 30 L. T. 726; *Howard v. Bank of England*, L. R. 19 Eq. 295. It is otherwise under the words of sect. 5 of the Act of 1882: *Reid v. Reid*, 31 C. D. 402; *Re Dixon*, 35 C. D. 4; *Re Bacon*, [1907] 1 Ch. 475. All the Act does is to create a statutory separate use. It does not give a legal separate property, nor give, excepting under the 11th section as between husband and wife, a remedy to the wife except through a Court of Equity. Her separate earnings, therefore, are under this Act equitable assets, distributable amongst all her creditors, and not legal assets out of which her executor is entitled to retain his own debt: *Re Poole's Estate*, 6 C. D. 739. This Act, it will be observed, contains no section like sect. 1 of the Act of 1882 affecting the capacity of a married woman to acquire, hold, and dispose by Will or otherwise of all real or personal property as if she were a *feme sole*.

(*k*) By Lord Mansfield, in *Haselinton v. Gill*, 3 T. R. 620.

(*l*) *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, *ibid.* 375, in W.E.—VOL. I.

death, the property did not form a part of the beneficial estate of his executors or administrators (*m*).

Law since
M. W. P. Act,
1882.
Stat. 45 & 46
Vict. c. 75,
s. 1.

These rules will still govern all those cases which do not fall within the Married Women's Property Act, 1882. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), by sect. 1, sub-s. (1), enacts that, "a married woman shall in accordance with the provisions of this Act be capable of acquiring, holding, and disposing by Will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee."

s. 2.

By sect. 2 it is enacted, that "every woman who marries after the commencement of this Act" [January 1, 1883], shall be entitled to have and to hold, as her separate property, and to dispose of, in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

s. 5.

And by sect. 5 (*n*), it is enacted that "every woman married

Lord Eldon's judgment. Where there is sufficient evidence to show an intention on the part of the wife that the husband shall employ the money for his own use, or for the family expenditure, as he might think proper, the assent of the wife to such application of the money puts an end to the trust for her separate use: *Gardner v. Gardner*, 1 Giff. 126.

(*m*) Thus, according to the equitable doctrine of separate use, if the husband survives and the wife dies in actual possession of her separate property without having exercised her right of disposing of it by deed or Will, the quality of separate property ceases at her death, and the fund belongs to the husband in his marital right, so that he need not become her administrator in order to entitle himself to it: *Molony v. Kennedy*, 10 Sim. 254. See also *Carne v. Brice*, 7 M. & W. 183; *Messenger v. Clarke*, 5 Exch. 388; *Bird v. Peagram*, 13 C. B. 639; *Bourne v. Fosbrook*, 18 C. B. N. S. 515. It is otherwise under the Act of 1882, as thereunder the wife takes as a *feme sole* and the husband, surviving, not having taken any legal interest, must obtain a grant of administration: see *ante*, p. 529, n. (*y*). The appointment by a married woman of executors is not a disposition by her of her separate estate so as to deprive her husband of separate estate undisposed of by her Will: *Re Lambert's Estate*, 39 C. D. 626.

(*n*) It is to be observed that in *Reid v. Reid*, 31 C. D. 402, and *Re Bacon*, [1907] 1 Ch. 475, it was decided that if a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the Act acquired a title whether vested or contingent, and whether in reversion or remainder, to any

“before the commencement of this Act shall be entitled to have
 “and to hold, and to dispose of, in manner aforesaid, as her
 “separate property, all real and personal property, her title to
 “which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and
 “property so gained or acquired by her as aforesaid.”

And further, by sect. 19, it is enacted, “that nothing in this s. 19.
 “Act contained shall interfere with, or affect, any settlement,
 “or agreement for a settlement, made or to be made, whether
 “before or after marriage, respecting the property of any
 “married woman, or shall interfere with, or render inoperative,
 “any restriction against anticipation at present attached, or to
 “be hereafter attached, to the enjoyment of any property or
 “income by a woman under any settlement, agreement for a
 “settlement, Will, or other instrument: but no restriction
 “against anticipation contained in any settlement, or agreement for a settlement, of a woman’s own property to be made
 “or entered into by herself, shall have any validity against
 “debts contracted by her before marriage, and no settlement, or
 “agreement for a settlement, shall have any greater force or
 “validity against creditors of such woman than a like settlement, or agreement for a settlement, made, or entered into,
 “by a man would have against his creditors” (o).

The scope of sect. 1 seems to be to declare the status of a married woman, and not to deal with the kinds of property affected by the Act, which latter are dealt with by sects. 2 and 5. Sect. 1 (1) must, however, be construed along with sects. 2 and 5 and does not give a married woman power to dispose of

Application
of sect. 1.

property, such property is not made her separate estate by sect. 5 (1) of the Act though it fall into possession after the commencement of the Act. On the other hand, sect. 7 of the Act of 1870, in which, the words are “to which she shall become entitled,” was held to include property to which the married woman had a reversionary title before marriage but which fell into possession afterwards: *Lane v. Oakes*, 30 L. T. N. S. 726; *Howard v. Bank of England*, L. R. 19 Eq. 295, 300.

(o) It may be observed that sect. 19 excludes from the operation of sect. 5 and the other sections, property the subject of any settlement, which would have bound it if the Act had not passed, even though such property may accrue to the wife after the commencement of the Act: *Re Stonor’s Trusts*, 24 C. D. 195; *Re Whitaker*, 34 C. D. 227; *Hancock v. Hancock*, 38 C. D. 78; *Stevens v. Trevor-Garrick*, [1893] 2 Ch. 307; *Buckland v. Buckland*, [1900] 2 Ch. 534. See now, Married Women’s Property Act, 1907, s. 2.

property not falling within the scope of either of the two latter sections (*p*).

It can hardly be that the statute intended to make all property possessed, or acquired, by a married woman in her own right her separate property, irrespective of the date of her marriage and the date of the acquisition of that property: otherwise sect. 2, sub-s. 1, and sect. 5 would be unnecessary. And there seems to be no property to which sect. 1 can apply beside the subject-matter of sects. 2 and 5. It cannot apply to property which is separate property by marriage settlement, because this is excluded from the operation of the Act by sect. 19, nor to *choses in action* not reduced into possession of a woman married before and acquired by her prior to the Act, because the Married Women's Property Act does not affect devolution, nor to property which has become the separate property of the wife by virtue of the Act of 1870, because the interest given to the wife under that Act is merely a beneficial interest, and the Act of 1882 does not amend the Act of 1870, but repeals it, and provides that such repeal shall not affect any act done or right acquired while the Act of 1870 was in force (*q*).

The Married Women's Property Act, 1882, unlike the 25th section (*r*) of the Divorce Act, 1857 (20 & 21 Vict. c. 85), does not affect the devolution of property undisposed of by the married woman (*s*).

The inquiry as to what words are sufficient according to the equitable doctrine to give the wife an interest separate from her husband appears to belong more properly to the general Law of Husband and Wife, than to a Work on the Law of Executors and Administrators; and it is not, therefore, deemed requisite to pursue it at any length in this Treatise: However, it is to be observed that questions as to the construction of settlements on married women or women about to be married may still not unfrequently arise, notwithstanding the Married Women's Property Act, 1882, because sect. 19 of that Act excludes such

(*p*) *Re Cuno*, 43 C. D. 12.

(*q*) This seems to be the view taken in *Re Cuno*, 43 C. D. 12.

(*r*) This section, referring to property acquired by the wife after the date of a judicial separation, provides that such property may be disposed of by her in all respects as a *feme sole*, and that on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead. See also *ante*, p. 321.

(*s*) *Re Lambert's Estate*, 39 C. D. 626.

settlements from the operation of it. Independently of the Married Women's Property Act, a gift to the separate use of an unmarried woman excludes a future husband (t), and an antenuptial settlement of money or jewels, furniture or other moveables, made by the husband himself of his own property upon the wife, will be valid, as well against the husband himself and volunteer claimants from him, as also against his creditors. Nor will it alter the case that the husband was indebted at the time of making the settlement, and that his future wife knew it: nor that the husband had the joint-possession, as long as he lived, of the furniture, &c. (u); nor that the wife brought him no portion.

Antenuptial settlement of money, jewels, &c., by the husband.

The same principle of equity which secures the interest of the wife in the case of a settlement or bequest, will protect it when the husband *agrees* before marriage, by writing, that his wife shall be entitled to specific parts of her personal estate to her separate use, although the legal title becomes vested in him by the subsequent marriage: In such a case the husband will be a trustee for the wife's separate use, and the trust will bind his executors and administrators (x).

Antenuptial agreement in writing.

(t) *Tullett v. Armstrong*, 4 Mylne & Cr. 377, 390.

(u) *Campion v. Cotton*, 17 Ves. 264. But where the husband, with the knowledge of the wife, had committed an act of bankruptcy before the execution of the settlement, and an adjudication of bankruptcy followed within twelve months, the settlement, though antenuptial, was, while such act of bankruptcy was available for adjudication, held invalid; for, by relation, the property had ceased to be the property of the bankrupt before the settlement was executed: *Fraser v. Thompson*, 4 De G. & J. 659. In the case of *Bulmer v. Hunter*, L. R. 8 Eq. 46, a man executed an antenuptial settlement and married a woman with whom he had previously cohabited with intent to defraud his creditors, the wife being implicated in the transaction, and it was held that the settlement was fraudulent and void as against creditors. And see sect. 42 (2) of the Bankruptcy Act, 1914; *Re Reis*, [1904] 1 K. B. 451; [1904] 2 K. B. 769.

(x) But the agreement must be in writing, by reason of the 4th section of the Statute of Frauds: *Randall v. Morgan*, 12 Ves. 74; *Warden v. Jones*, 23 Beav. 487; *S. C.*, 2 De G. & J. 76; *Goldioutt v. Townshend*, 28 Beav. 445. These and other authorities have overruled *Dundas v. Duters*, 1 Ves. 199. But if a man, on his marriage with a woman, enters into a mere parol agreement with her, that a sum of money shall be transferred to trustees upon trust for himself, his intended wife, and the children of the marriage, and the money is, before the marriage, actually transferred to the trustees, who hold it solely upon the trusts agreed upon, the fact that the instrument declaring the trusts is executed by them subsequently to the marriage does not make it a voluntary instrument, and enable creditors to set it aside: *Cooper v. Wormald*, 27 Beav. 270. Indeed, if the non-reduction into writing be owing to the fraudulent conduct of the husband, equity will relieve: *Lady Montacute v. Maxwell*, 1 P. Wms. 620.

Post-nuptial
settlement.

Likewise a *post-nuptial* settlement of property by the husband on the wife is obligatory upon himself and all persons claiming as volunteers from or through him (*y*). And such a settlement will protect the property even against creditors, unless it can be considered, from the circumstances under which it was made, fraudulent as against them, under the statutes of Elizabeth (*z*); or unless it is avoided by the provisions of the Bankruptcy Act (*a*).

Separate
property
acquired by
wife's
separate
trading.

Besides the means already described of the acquirement "according to the Equitable doctrine" of separate property by a wife, she, even before the Married Women's Property Acts, might also do so by carrying on trade apart from her husband, on her separate account, either in consequence of an express agreement between her and her husband before marriage, or by his permission after marriage (*b*). There was an important distinction between the wife's right to property acquired in the two cases. When the agreement was made previously to marriage, since the consideration was valuable, the transaction was not only to be obligatory upon the husband and his executors, but also binding upon his creditors: when the agreement originated during the marriage, it was void against his creditors, but good against himself (*c*).

(*y*) See *Curtis v. Price*, 12 Ves. 89.

(*z*) The question of the avoidance of settlements as against creditors under stat. 13 Eliz. c. 5, and the avoidance of voluntary settlements of lands, &c., as against purchasers under stat. 27 Eliz. c. 4, are so wide, and the authorities upon them so numerous, that it is considered better to refer the reader to the text-books which deal exclusively with the subject, and not to undertake a detailed examination of the law on a point which is but distantly connected with the subject-matter of this work. See May on Fraudulent and Voluntary Dispositions of Property. By the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), s. 2, it is enacted that "Subject as hereinafter mentioned no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding."

(*a*) As to the effect of the bankruptcy of a person making a post-nuptial settlement upon such settlement, see sect. 42 of the Bankruptcy Act, 1914.

(*b*) See *Haddon v. Fladgate*, 1 Sw. & Tr. 48, *ante*, p. 47, note (*a*). An agreement with, or permission from, her husband has not been necessary, since the Married Women's Property Acts, 1870 and 1882. See *ante*, p. 576, note (*i*).

(*c*) 2 Rep. 165, 2nd edit.

The savings arising from the separate property of the wife will not form a part of the estate of her husband's executor: for "the sprout is to savour of the root and go the same way" (*d*). And so jewels, or other things, bought by the wife, with money arising out of her separate property, will not be assets liable to the husband's debts (*e*). But as she is entitled to deal with her separate estate as she pleases, if she directly authorizes any moneys which form a part of it, or the savings arising from it, to be paid to her husband, he is entitled to receive them, and she can never recall them (*f*).

Savings, &c.,
from wife's
separate
property:

The general rule of law, before the Married Women's Property Act, derived from the unity of person, was that gifts from the husband to the wife were void: "But in Courts of Equity," Lord Hardwicke says in *Lucas v. Lucas* (*g*), "gifts between husband and wife have often been supported, though the law does not allow the property to pass."

gifts from the
husband to
the wife:

For though the property did not pass at law, yet in equity a husband, being the owner at law, might become a trustee for his wife, and if by clear and irrevocable acts he made himself such trustee the gift to his wife was conclusive (*h*).

Thus in *Lucas v. Lucas* (*i*), Lord Hardwicke decreed that the defendant in the cause, a widow, was entitled to 1,000*l*. South Sea Annuities transferred by her husband, in his lifetime, into the name of his wife, as a valid gift against the husband and his representatives.

So stock purchased by a man in the names of himself and his wife was, on his death, held by the Vice-Chancellor (Sir John Leach) to go to her as the survivor (*k*). And in a similar case, Lord Eldon, C., said it was *primâ facie* a gift

stock, &c.,
purchased by
husband in
the names of
himself and
wife, or in
her name:

(*d*) *Gore v. Knight*, 2 Vern. 535. So as to her savings out of her alimony: *Moore v. Barber*, 34 L. J. Ch. 667.

(*e*) *Duncan v. Cashin*, L. R. 10 C. P. 554. Accordingly in *Brooke v. Brooke*, 25 Beav. 342, husband and wife had for many years lived, and were still living separate: He remitted money for her maintenance and support: She saved a considerable portion:—And it was held by Romilly, M. R., that the husband could not recover back these savings; for that the remittances must, as against the husband, be treated as her separate estate.

(*f*) *Caton v. Rideout*, 1 Mac. & G. 559. But see also *Darkin v. Darkin*, 17 Beav. 578.

(*g*) 1 Atk. 271. See also *Graham v. Londonderry*, 3 Atk. 393.

(*h*) *Mews v. Mews*, 15 Beav. 533; *Grant v. Grant*, 34 L. J. Ch. 641. See *post*, p. 584, n. (*p*), as to imperfect gifts by husband to wife.

(*i*) 1 Atk. 271.

(*k*) *Lorimer v. Lorimer*, MSS. Mr. Beames, n. (46), to *Rider v. Kidder*, 10 Ves. 367, 2nd edit.

to herself in the event of her surviving, unless evidence of contemporaneous acts, showing a contrary intention, were produced (*l*). So where the husband lends out money upon securities taken in the names of himself and wife, and dies, the wife is entitled by survivorship, if there are sufficient assets without this money to pay debts (*m*). And, generally, where a husband purchases personal property in the name of his wife, or in their joint names, it will be presumed, in a case clear of fraud, to have been intended as an advancement and provision for the wife, and on surviving her husband she will be entitled, unless he has aliened the property in his lifetime (*n*).

what is sufficient evidence of a gift by husband to wife.

But where the widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion (*o*); and nothing less will do than a clear irrevocable gift, either to some person as trustee, or by some clear and distinct act of his, by which he divested himself of the property, and engaged to hold it as trustee for the separate use of his wife (*p*); and since the Married Women's Property Act, 1882, such a gift may be made to the wife direct.

(*l*) *Wilde v. Wilde*, MS. 1 Roper, Husb. and Wife, by Jacob, 54; *Vance v. Vance*, 1 Beav. 605; *Williams v. Davies*, 33 L. J. P. & M. 127; *Re Ekin's Trusts*, 6 C. D. 115.

(*m*) *Christ's Hospital v. Budgin*, 2 Vern. 683.

(*n*) *Kingdon v. Bridges*, 2 Vern. 67; *Glaister v. Hewer*, 8 Ves. 129. But the presumption may be rebutted: *Marshal v. Crutwell*, L. R. 20 Eq. 328. So where a man from time to time gave his wife sums of money, part of which accumulated as stock in his name, and he received the dividends and paid them to her, and in every way treated the stock as her separate property: it was held by Sir Cresswell Cresswell, that the wife had acquired a separate estate, of which the husband had considered himself trustee for her, and to which the *jus disponendi* attached: *In the goods of Smith*, 1 Sw. & Tr. 125.

(*o*) *Walter v. Hodge*, 2 Swanst. 92; *Re Whittaker*, 21 C. D. 657. There is, however, no rule of law that the Court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone, unless it is corroborated. Where a claimant's case depends entirely on his own evidence, the judge ought to sift that evidence very carefully; but if the claimant gives evidence which is not shown to be inaccurate in any material point, and which satisfies the judge of its truthfulness, he ought to act upon it though it be not corroborated: *Per Cotton, L. J.*, in *Re Dillon*, 44 C. D. 76, 80. See also *Re Garnett*, 31 C. P. 9; *Re Hodgson*, *ibid.* 177; *Rawlinson v. Scholes*, 79 L. T. 350; and see *post*, p. 594, n. (cc).

(*p*) *M'Lean v. Longlands*, 5 Ves. 79, by Lord Alvanley. See also 2 Swanst. 104; *Mews v. Mews*, 15 Beav. 329; *Hoyes v. Kindersley*, 2 Sm. & G. 195; *Lloyd v. Pughe*, L. R. 8 Ch. 88; *Parker v. Lechmere*, 12 C. D. 256. See also *Re Patrick*, [1891] 1 Ch. 82, in which case an assignment of certain debts, but without any express assignment of the securities for the debts, was held by the Court of Appeal (affirming

In a case, however, where a husband gave directions to his bankers to invest a sum of money in the funds, in the joint names of himself and wife, and their brokers accordingly made the purchase: Lord Langdale, M.R., held that the wife was entitled to the stock by survivorship, although the husband died after the contract, but before the transfer had been completed (q).

Those gifts of money by the husband to the wife for Pin-money: clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin-money (r), will be good in equity as against the husband, and all volunteer claimants through him (s).

Pin-money may be defined to be money to which is annexed a duty on the part of the wife of applying it for her own personal dress decoration and ornament, that is, for certain

Kekewich, J.) to be a complete assignment of the debts. If the husband makes an imperfect gift to the wife the Court will not in the case of a husband and wife, any more than in any other case, hold that the intending donor is a trustee for the wife: *Re Breton*, 17 C. D. 416; *Moore v. Moore*, L. R. 18 Eq. 474. See, however, the cases to the contrary cited by Hall, V.-C., in his judgment in *Re Breton*, which the learned judge seems to have declined to follow (*Grant v. Grant*, 34 L. J. Ch. 641; *Fox v. Hawks*, 13 C. D. 822; *Baddeley v. Baddeley*, 9 C. D. 113), in which imperfect gifts by a husband to a wife seem to have been treated as not governed by the rule, applying to imperfect gifts to a stranger, laid down in *Milroy v. Lord*, 4 De G. F. & J. 264; *Richards v. Delbridge*, L. R. 18 Eq. 11. Cases of imperfect gifts of a husband to a wife will be less likely to arise now that the wife can take a gift as if she were a *feme sole* (Married Women's Property Act, 1882), but of course may arise where the form of instrument is not applicable to transfer the property in question. The ground for supporting, as a declaration of trust, an instrument prior to the Married Women's Property Act, 1882, purporting to transfer property to the wife directly, seems to have been that the husband, if he knew the law, could not have intended the instrument to operate as a transfer, and if the gift is intended to be taken by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. It must be remembered that, to constitute a gift, there must be either a transfer of property or a declaration of trust, for there is no equity to perfect an imperfect gift. See *Milroy v. Lord*, 4 De G. F. & J. 264, 274; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Moore v. Moore*, *ibid.* 474, and cf. *Richardson v. Richardson*, L. R. 3 Eq. 686, and *Morgan v. Malleson*, L. R. 10 Eq. 475, disapproved in *Richards v. Delbridge* (*vide supra*), but approved by Bacon, V.-C., in *Fox v. Hawks*, 13 C. D. 822. As to what is necessary to constitute a declaration of trust, see *Warriner v. Rogers*, L. R. 16 Eq. 340, 348.

(q) *Vance v. Vance*, 1 Beav. 605.

(r) As to the nature of pin-money, see the elaborate observations of Lord Brougham, C., in *Howard v. Digby*, 2 Cl. & Fin. 634; 3 Bligh, 224.

(s) 2 Roper, Husb. and Wife, 132, 2nd edit.

purposes in which her husband as well as herself has an interest, and is not money which, like her separate estate, she can do what she pleases with (*t*).

and similar
allowances
from husband
to wife:

Similar allowances have been supported in equity; as where the husband voluntarily allowed the wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from a farm (over and besides what was used by the family) for her own separate use, and called it her pin-money; out of which the wife saved 100*l.*; which the husband borrowed, and died; Lord Chancellor Talbot decreed, that *there being no deficiency of assets to pay debts*, the widow should come in as a creditor for the 100*l.*; and the Court mentioned the case of *Calmady v. Calmady*, where there was a like agreement made betwixt husband and wife, that upon every renewal of a lease by a husband, two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money (*u*).

So also in *Mangey v. Hungerford* (*x*), the wife had saved a considerable sum of money out of housekeeping, and in a suit instituted against her for a discovery of what she had saved, she insisted by answer that she was not bound to make such a discovery; and upon exceptions to the answer, it was held sufficient by Lord King.

property
acquired by
wife after a
protection
order under
Divorce Act:

There has already (*y*) been occasion to show that, under the Divorce Act, 1857, s. 25, property acquired by a wife, after obtaining a protection order, may be disposed of by her in all respects as a *feme sole*, and will devolve on her death as if her husband were then dead.

savings out of
pin-money
and other
allowances,
when liable
to husband's
debts:

It often happens that pin-money is settled on the wife by agreement previous to marriage; in which case the settlement of pin-money will be binding not only on the husband and volunteer claimants through him, but also on his creditors. But if the wife, by good management, effect savings out of her pin-money or other allowance made by the husband, *not* in pursuance of an ante-nuptial contract, such savings, as well as jewels so purchased by the wife out of them, will not, it would

(*t*) *Jodrell v. Jodrell*, 9 Beav. pp. 54, 55, *per* Lord Langdale. Besides personal decoration, its objects would, it would seem, include charities and bounties to servants. See *Howard v. Digby*, 2 Cl. & Fin. 658.

(*u*) *Slanning v. Style*, 3 P. Wms. 339.

(*x*) 2 Eq. Cas. Abr. 156, *in margine*.

(*y*) *Ante*, pp. 47, 580.

seem, be exempt from the husband's debts, but will be assets for the purpose of satisfying them, in the hands of his executor (*z*), although protected from voluntary claims.

If pin-money be in arrear, and the husband dies, the wife may claim the arrears against her husband's representatives: though such claim cannot, it has been said, be carried further back than one year's income (*a*). This restriction appears to have been founded partly on a supposed satisfaction by acquiescence, on the notion of the consent of the wife, to make it a common fund for the expense of the family (*b*); and partly on the consideration, that the money is meant for the dress and ornament of the wife, in a mode suitable to the degree of the husband, so as to maintain his dignity, and not for the accumulation of the fund; so that if the wife does not choose to expend the money for the purpose to which it was appropriated, viz., to support his and her rank in society, she cannot justly claim the arrears of it (*c*). Again, if pin-money be in arrear, and the wife dies, her representatives cannot sustain any claim for it whatever; the ground of which rule is, that the pin-money was not meant for the sustentation of the wife, but for her dress and ornament in a station suitable to the degree of her husband: The authorities connected with this subject, and the nature of pin-money in general, were fully discussed and commented on in the arguments of counsel and the judgment of Lord Brougham in a case relating to the arrears of the pin-money of the Duchess of Norfolk (*d*).

Arrears of pin-money, what recoverable.

Another instance where the wife might formerly acquire a property in her husband's personal chattels, by gift from him, so as to exclude his executors or administrators, is to be found in her paraphernalia (*e*). The term is borrowed from the civil

Paraphernalia:

(*z*) *Willson v. Pack*, Prec. Chan. 297.

(*a*) *Peacock v. Monk*, 2 Ves. Sen. 190; *Thrupp v. Harman*, 3 M. & K. 513.

(*b*) *Brodie v. Barry*, 2 V. & B. 36.

(*c*) *Howard v. Digby*, 2 Cl. & Fin. 634, 657.

(*d*) *Ibid.* 634. See also *Jodrell v. Jodrell*, 9 Beav. 45. Lord St. Leonards, however, says, in discussing the above-mentioned case of *Howard v. Digby*: "I have once more looked into all the authorities on this subject, but I cannot find any which would support the decision in the House of Lords. There are, however, several which it would seem to be difficult to reconcile with that authority": *Law of Property*, p. 170.

(*e*) See now, *post*, p. 593.

(*f*) 2 Black. Comm. 436. A bed is also in some authors enumerated

what are so
considered :

law, and is derived from the Greek, *παρα φερνν*, i.e., something to which she is entitled over and above dowry. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree (*f*). What are to be so considered, are questions to be decided by the Court, and will depend upon the rank and fortunes of the parties (*g*).

Pearls and jewels, whether usually worn by the wife, or only on birthdays; and other public occasions, are to be considered paraphernalia (*h*). In the reign of Queen Elizabeth, the executors of Viscount Bindon brought detinue against the widow of the deceased viscount, and declared upon the detainer of certain jewels: The defendant justified the detainer of them as her paraphernalia: It was said by Manwood, Chief Baron. that paraphernalia ought to be allowed to a widow, having regard to her degree, and in this case the husband of the defendant being a viscount, 500 marks was but a good allowance for such a matter (*i*).

In the reign of Charles I. a chain of diamonds and pearls worth 370*l.*, being usually worn by a lady, who was a daughter of an earl of Ireland, and a baron of England, and the wife of a knight and a sergeant-at-law of the king, were considered *bona paraphernalia* (*j*). In the year 1674, Lord Keeper Finch said, he never knew any paraphernalia allowed, but where the party was noble either by birth or marriage (*k*): but in the year 1721, Lord Macclesfield, in the case of *Tipping v. Tipping* (*l*), decreed, that the widow of a commoner should have jewels, &c.; to the value of 200*l.* and upwards, as her *bona paraphernalia*. Lord Talbot afterwards allowed the widow of a private gentleman her gold watch, and several gold rings given at the burials of relations (*m*). And in a case where a Mrs. Northey, in the lifetime of her husband, was possessed of jewels to the value of

among the paraphernalia: Com. Dig. Baron and Feme (F. 3). Noy enumerates: "all her apparel, her bed, her copher, her chains, borders, and jewels": Max. c. 49. And Swinburne mentions the ancient and general custom, as to widows, of the province of York, as extending "not only to their apparel, and a convenient bed, but a coffer with divers things therein necessary for their own persons": Pt. 6, s. 7, pl. 5.

(*g*) 2 Roper, Husb. and Wife, 141, 2nd edit.

(*h*) *Graham v. Londonderry*, 3 Atk. 394, by Lord Hardwicke.

(*i*) *Viscountess Bindon's Case*, 2 Leon. 166, pl. 201.

(*j*) *Lord Hastings v. Sir A. Douglas*, Cro. Car. 343.

(*k*) *Lady Tyrrell's Case*, 1 Freem. 304.

(*l*) 1 P. Wms. 729.

(*m*) 2 Eq. Cas. Abr. 156, *in margine*.

3,000*l.* and upwards, which had been bought partly with her own money, and partly her husband's, and had been worn by her whenever she was dressed; Lord Hardwicke held, that she was entitled to them as paraphernalia, and said, that the value made no alteration in the Court of Chancery (*n*).

The following case, as decided Mich. 5 Geo. I., is reported in Viner's Abridgment (*o*): Mr. Calmady having a crocheat of diamonds, which was his first wife's, in 1695 makes his Will, and, amongst other things, devises this crocheat to his eldest son, and that it should go in succession to the heir of his family as an heirloom: Afterwards, in 1699, he marries a second wife, (the defendant), and turns this crocheat into a necklace, and adds several new diamonds to it to the value of 200*l.*, which was more than the value of the crocheat: The plaintiff, as heir to Mr. Calmady (though not the eldest son to whom it was specifically devised), demands this crocheat of the defendant, the widow of Mr. Calmady: Counsel for the defendant insisted that the defendant was entitled to it as part of her paraphernalia, which the husband cannot give away from his wife by Will, though he may dispose of it in his lifetime, and the wife shall retain it against the devisee or executor of her husband, unless in the case of creditors, who cannot otherwise have a satisfaction of their debts: Counsel for the plaintiff said, that though formerly it was a doubt whether the husband could devise any part of the paraphernalia of the wife, yet of late it had been holden, that the husband may devise specifically jewels of his own which he permitted his wife to wear, though they shall not go to his executor, or to a general residuary legatee, and that, in this case, there being no direct proof of an express gift to the wife, only a permission to wear them, they are well devised to the heir as an heirloom and that the altering and turning the crocheat into a necklace, and permitting his wife to wear them, was no revocation of the devise: Parker, C., seemed to doubt at first, that turning the crocheat into a necklace, adding new diamonds to it, and permitting his wife to wear it, was a revocation of the devise, but at last ordered the Master to examine and separate the old diamonds from the new, and decreed the diamonds of the crocheat to the plaintiff as heir-at-law, and specifically devised to him as an heirloom.

(*n*) *Northey v. Northey*, 2 Atk. 79.

(*o*) *Calmady v. Calmady*, 11 Vin. Abr. 181, pl. 21.

On the authority of this case it was ruled by Lord Romilly in *Jerroise v. Jerroise* (*p*), that family jewels, which have been handed down from father to son, do not constitute paraphernalia, notwithstanding they may have been worn by the wife at court and on other full dress occasions, but that jewels presented to a wife during coverture by a third person, or by her husband for the purpose of ordinary use as befitting her station in life, are properly paraphernalia.

By the custom of London, a citizen's widow might retain some part of her jewels as paraphernalia, but not all (*q*).

It will make no difference as to the widow's right that the jewels, &c., were in the custody of the husband, if the wife occasionally wore them (*r*).

the wife cannot dispose of them by gift or Will during her husband's life:

There was formerly an important distinction between gifts of the husband to the wife for her separate use, and gifts by him to her as paraphernalia (*s*); for she might dispose absolutely of the things given to her for her separate use; but where the husband gave them to her expressly for the ornament of her person, she could not dispose of them by gift or Will during his life (*t*): although by the civil law, the wife had such an absolute property in them that she might alien them *in vitâ mariti, invito marito* (*u*). And the husband might sell them or give them away in his lifetime (*x*), although he could not dispose of them by Will during her life (*y*).

the husband may sell them or give them away:

but he cannot devise them:

By the civil law, *bona paraphernalia* in all cases go to the wife, to the exclusion of the executor, nor are they subject to the payment of the husband's debts (*z*). But by our law they

they are subject to the

(*p*) 17 Beav. 566. But as to those presented to her by a third person, see *post*, p. 593, *contra*.

(*q*) 11 Vin. Abr. 180, pl. 17.

(*r*) *Northey v. Northey*, 2 Atk. 79.

(*s*) See *Tasker v. Tasker*, [1895] P. 1, *ante*, p. 576.

(*t*) *Graham v. Londonderry*, 3 Atk. 394.

(*u*) Cro. Car. 344, by Berkeley and Jones, Justices; 3 Bac. Abr. 66; Executors (H. 4).

(*x*) *Graham v. Londonderry*, 3 Atk. 394.

(*y*) *Cary v. Appleton*, 1 Cas. Chan. 240; Godolph. Pt. 2, c. 15, s. 1; *Tipping v. Tipping*, 1 P. Wms. 730; *Northey v. Northey*, 2 Atk. 78, 79; *Seymour v. Tresilian*, 3 Atk. 358; 2 Black. Comm. 436. This was denied by Richardson, C. J., and Cooke, J., in *Lord Hastings v. Douglas*, Cro. Car. 345, though agreed to by Berkeley and Jones, Justices; and Harcourt, C., reserved the consideration of the point in *Wilcox v. Gore*, 11 Vin. Abr. 180, 181. See also *Calmady v. Calmady*, *ibid.* 181, *ante*, p. 589; and 3 Bac. Abr. 66; Executors (H. 4), where the husband's power to dispose of them by Will is asserted.

(*z*) Swinh. Pt. 6, s. 7, pl. 5; Godolph. Pt. 2, c. 15, s. 1.

are clearly liable to his creditors, and, therefore, the widow will not be entitled to them (except as far as her necessary apparel) (a) in case of a deficiency of assets (b). Nor are they to be allowed to her, where there are not assets at the time of her husband's death, though contingent assets afterwards fall in; for the same might not have happened until twenty or thirty years after the death of the testator, nor possibly until after the death of the widow, when the end and design of the widow's wearing her *bona paraphernalia*, in memory of her husband, could not have been answered, and, therefore, it was reasonable that this should be reduced to a certainty, viz., that if there should not be assets real and personal at the testator's death, or, at least, at the time when the jewels were applied to debts, then the jewels should be liable (c).

debts of the husband:

But the widow's claim to her paraphernalia is preferred to that of a legatee of her husband, and, therefore, they will not be liable to satisfy the testator's legacies, or any of them (d), either general or specific (e).

but not to his legacies:

Likewise, where a creditor has a double fund, the widow's claim to paraphernalia shall not be disappointed by the effect of his option of resorting to the personal estate (f). Therefore, if the personal estate, including the paraphernalia, had been exhausted in payment of specialty creditors, the widow, in equity, stood in their place as to so much upon the real assets of the heir-at-law (g). So where there is a real trust estate, charged with the payment of the husband's debts, the wife may resort to the trust to be reimbursed to the value of her paraphernalia, if the personal estate has been exhausted by her husband's creditors (h). So a real estate, charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia (i).

the widow is entitled to marshal the assets against the heir:

and against a devise in trust:

But whether the widow shall stand in the place of creditors (quære, whether

(a) Noy's Maxims, c. 49, 2 Black. Comm. 436.

(b) *Campion v. Cotton*, 17 Ves. 264. "It is not fit," said Lord Keeper Finch, "that the widow should shine in jewels and the creditors starve": *Lady Tyrrell's Case*, 1 Freem. 304.

(c) *Burton v. Pierpont*, 2 P. Wms. 79.

(d) *Snelson v. Corbet*, 3 Atk. 370.

(e) In *Graham v. Lord Londonderry*, 3 Atk. 395, Lord Hardwicke said that the right of the wife was superior to that of any legatee.

(f) *Aldrich v. Cooper*, 8 Ves. 397.

(g) *Snelson v. Corbet*, 3 Atk. 369. See also *Tipping v. Tipping*, 1 P. Wms. 729; *Tynt v. Tynt*, 2 P. Wms. 544.

(h) *Inledon v. Northcote*, 3 Atk. 438.

(i) *Boyntun v. Boyntun*, 1 Cox, 106.

against a
devisee:

for the amount of her paraphernalia against real assets *devised*, unless in trust for payment of debts, appears doubtful (*k*). According to Lord Hardwicke's decisions in *Ridout v. Plymouth* (*l*), and *Probert v. Morgan* (*m*), she is not so entitled; but the case of *Tynt v. Tynt* (*n*) is at variance with those decisions. It seems, however, that if the devised estate be subject to a mortgage, or other specific incumbrance, she would have a right to marshal the assets by throwing the charge upon the estate, as a legatee might in such a case (*o*).

if the husband
pawn the
parapher-
nalia, his
executors
must redeem
them for the
widow:

It has already appeared that the husband may alien the wife's paraphernalia in his lifetime; but if the alienation be not absolute, but as a pledge or security for money, the wife surviving him will be entitled to have them redeemed by his executors out of her husband's personal estate, if sufficient for that purpose, after payment of his debts (*p*).

the widow
barred of her
parapher-
nalia by
marriage
articles:

The widow may bar her right to paraphernalia by settlement before marriage: as in *Cholmely v. Cholmely* (*q*), where the wife by her marriage articles agreed to have no part of her husband's personal estate, but what he should give her by Will; and this was held to bar her of her paraphernalia (*r*).

by election to
take them as
legatee.

If the husband should bequeath to his wife all household goods, furniture, plate, *jewels*, linen, &c., for life or widowhood, with the remainder over, this will not bar her of her paraphernalia (*s*). But in such a case if the widow does not, by some act in her lifetime, manifest her election to take them by her elder and better title, her executor or administrator cannot lay any claim to them after her decease (*t*).

Jewels, &c.,
given for the
separate use

Paraphernalia are in their nature materially distinct from gifts of jewels, &c. to the wife, by third persons, for *her*

(*k*) See Cox's note to *Tynt v. Tynt*, 3 P. Wms. 544. It has been suggested by an able writer (Joshua Williams on Real Assets, p. 118), that since the stat. 3 & 4 Will, 4, c. 104, she may marshal the assets in this case also; because she is, as to her paraphernalia, in a position similar to that of a simple contract creditor, who, by force of that statute, may come upon any part of the property of the deceased.

(*l*) 2 Atk. 105.

(*m*) 1 Atk. 440.

(*n*) 2 P. Wms. 542, before the Master of the Rolls, 1729.

(*o*) *Oneal v. Mead*, 1 P. Wms. 693; 2 Roper, Husb. and Wife, 146, note (*a*) by Jacob. See in *Re Butler*, [1894] 3 Ch. 250. See *post*, Pt. IV. Bk. I. Ch. II. §§ I. & II.

(*p*) *Graham v. Londonderry*, 3 Atk. 395.

(*q*) 2 Vern. 83.

(*r*) *Read v. Snell*, 2 Atk. 642.

(*s*) *Marshall v. Blew*, 2 Atk. 217.

(*t*) *Clarges v. Albemarle*, 2 Vern. 247.

separate use: as the latter are her absolute property and may be aliened by the wife in the lifetime of the husband, and are not liable to his debts. With respect to what shall be considered as given to her separate use; where some diamonds had been presented to the wife by the husband's father, on her marriage with his son, they were considered by Lord Hardwicke as a gift to the separate use of the wife, and to which she was entitled in her own right (*u*). So where certain pieces of plate were given to the wife immediately after marriage, by the husband's father, Lord Hardwicke decided that they were to be considered as gifts to the wife for her separate use (*x*). And a present by a stranger to the wife during coverture must be construed as a gift to her separate use: as where the Regent of France delivered to the husband, as a present for his wife, his picture set about with diamonds (*y*).

But with respect to jewels, &c., presented to the wife by the husband himself before marriage, there was, before the Married Women's Property Act, no exemption from the liability to his creditors: for immediately on the marriage, the law gave them to the husband, and he could not be considered as a trustee for them for her separate use afterwards (*z*).

scus, of jewels presented by the husband before marriage in cases to which the M. W. P. Act does not apply.

As we have already seen, any woman married since the Married Women's Property Act is entitled to hold and dispose of, in the same manner as if she were a *feme sole*, as her separate property, all personal property whensoever and from whomsoever she may acquire it, and her husband has no interest in such property, nor is such property liable to his creditors. And though the Married Women's Property Act does not in express terms abolish the general law as to gifts of paraphernalia, yet that law has ceased to exist, and wearing apparel purchased by a wife for her personal use with money supplied by her husband for the purpose is *primâ facie* her separate property (*a*).

(*u*) *Graham v. Londonderry*, 3 Atk. 393.

(*x*) *Brinkman v. Brinkman*, cited in *Graham v. Londonderry*, 3 Atk. 394.

(*y*) 3 Atk. 393. Lord Hardwicke in this case mentioned the case of Countess Cowper, in which several trinkets (which it is presumed, were not intended to be worn, like paraphernalia, as ornaments to her person) had been given to her by Lord Cowper himself in his lifetime, and they were held by Sir Joseph Jekyll to be her separate estate. See also this case again noticed by his lordship, in 1 Atk. 271.

(*z*) *Ridout v. Lord Plymouth*, 2 Atk. 105.

(*a*) *Masson Templier & Co. v. De Fries*, [1909] 2 K. B. 831.

SECTION IV.

Of Donations *Mortis Causâ*.

It will be proper to close the subject of the estate of an executor or administrator in the chattels personal of the deceased in possession, by considering another species of interest in the property of the deceased, which vests neither in the personal representative, nor in his heir, nor in his widow. This is called a *Donatio Mortis Causâ*, and is thus defined in the civil law, from which both the doctrine and the denomination are borrowed: *Mortis causâ donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitùs ei contigisset, haberet is, qui accepit; sin autem supervivisset is, qui donavit, reciperet; vel si eum donationis pœnituisset; aut prior decesserit is, cui donatum sit* (b).

Attributes of
a *donatio*
mortis causâ:

To constitute a *donatio mortis causâ*, there must be three attributes: 1. The gift must be with a view to the donor's death. 2. It must be conditioned to take effect only on the death of the donor by his existing disorder. 3. There must be a delivery of the subject of the donation (c).

1. The gift
must be made
by the donor
in peril of
death.

1. The gift must be made with a view to the donor's death (cc). If a gift be not made by the donor in peril of death, *i.e.*, with relation to his decease by illness affecting him at the time of the gift, it cannot be supported as a donation *mortis causâ* (d). Where it appears that the donation was made

(b) Inst. lib. 2, tit. 7. The correctness of this definition, and the inaccuracy of that given by Swinburne, Pt. 1, s. 7, pl. 2, is noticed by Lord Loughborough, in *Tate v. Hilbert*, 2 Ves. 119. The description of a *donatio mortis causâ* given by Lord Cowper, is, "where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his Will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him:" *Hedges v. Hedges*, Prec. Chanc. 269.

(c) As to what is a sufficient delivery where the nature of the thing will not admit of a corporeal delivery, see *post*, p. 597 *et seq.*

(cc) *Duffield v. Elwes*, 1 Bligh, N. S. 530. The evidence must be clear that the donor gave it in contemplation of death. The burden of proof is necessarily on the donee, and no case ought to prevail unless it is supported by evidence of the clearest and most unequivocal character: *Cosnahan v. Grice*, 15 Moo. P. C. 215. But a *donatio mortis causâ* will be established solely on the evidence of the donee if such evidence is considered trustworthy: *Re Dillon*, 44 C. D. 73, 80; *Re Farman*, 57 L. J. Ch. 697; *McGonnell v. Murray*, Ir. R. 3 Eq. 460; *Re Weston*, [1902] 1 Ch. 680, 684; and see *ante*, p. 584, n. (o).

(d) *Tate v. Hilbert*, 2 Ves. 121; *Gardiner v. Parker*, 3 Madd. 185. See also *Edwards v. Jones*, 1 Myln. & Cra. 235: *infra*.

whilst the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death (e), and in the donor's last illness (f). A gift made in contemplation of suicide is not a valid *donatio mortis causâ* (g).

2. The gift must be conditioned to take effect only on the death of the donor by his existing disorder (h). But, although it is an essential incident to a donation *mortis causâ* that it be subject to a condition, that, if the donor live, the thing shall be restored to him, yet it is not necessary that the donor should expressly declare that the gift is to be accompanied by such a condition: for if a gift be made during the donor's last illness, the law infers the condition that the donee is to hold the donation only in case the donor die of that indisposition (i). Thus in *Gardiner v. Parker* (k), A., being confined to his bed, gave to B. a bond for 1,800*l.* two days before his death, in the presence of a servant, saying, "There, take that, and keep it:" The question was between the donee and executors of A.: And Sir John Leach, V.-C., decided in favour of the donation, observing that the doubt originated in the donor not having expressed that the bond was to be returned if he recovered: but that the bond being given in the extremity of sickness, and in contemplation of death, the intention of the donor was to be inferred that the bond shall be holden as a gift only in case of his death; and that if a gift be made in the expectation of death, there is an implied condition that it is to be held only in the happening of that event.

Still, if from all the circumstances of the gift, there is sufficient evidence to rebut the ordinary presumption, and to make it appear that the gift was unconditional, it cannot be supported as a donation *mortis causâ* (l). Accordingly in *Edwards v. Jones* (m), Mary Custance, the obligee of a bond given in the

(e) *Gardiner v. Parker*, 3 Madd. 184.

(f) 1 *Rop. Leg.* 21, 3rd edit. In *Blount v. Burrow*, as reported in 1 Ves. 546, Eyre, C. B., seems to be of opinion, that there must be positive evidence that the gift was made in the last illness: but this dictum is not found in the report of the case in 4 Bro. C. C. 72, and does not seem supported by any other authorities.

(g) *Agnew v. Belfast Banking Co.*, [1896] 2 Ir. R. 204.

(h) *Irons v. Smallpiece*, 2 Barn. & Ald. 553; *Tate v. Leithead*, Kay, 658; *Staniland v. Willott*, 3 Mac. & G. 664, 675.

(i) 1 *Rop. Leg.* 4, 3rd edit.

(k) 3 Madd. 184.

(l) See *Walter v. Hodge*, 2 Swanst. 92.

(m) 1 *Mylne & Cra.* 226.

2. The gift must be conditioned to take effect only on the death of donor.

year 1819, for 300*l.*, signed the following indorsement not under seal, on the bond, five days before her death: "I, Mary Custance, of the town of Aberystwith, in the county of Cardigan, widow, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, Esther Edwards, of Llanilar, in the said county of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon; as witness my hand, this 25th day of May, 1830;" Immediately after the indorsement had been signed, Mary Custance delivered the bond, or caused it to be delivered, to Esther Edwards, and it remained in her hands: Mary Custance died on the 30th of May, 1830, having in the year 1829 made her Will, in which she did not mention the bond, or dispose of the residue of her estate, but she appointed an executor: It was argued on the part of Esther Edwards that if this gift could not be established as a *donatio inter vivos*, by reason of the act being incomplete, it might still take effect as a *donatio mortis causâ*: But Lord Chancellor Cottenham held, that in order to be good as a *donatio mortis causâ*, the gift must have been made in contemplation of death, and intended to take effect only after the donor's decease; and that if it appeared from the circumstances of the transaction, that the donor intended to make an immediate and irrevocable gift, that would destroy the title of the party, who claimed as a donee *mortis causâ*: His Lordship further observed, that a party making a *donatio mortis causâ* does not part with the whole interest, save only in a certain event, and it is of the essence of such a gift, that it shall not otherwise take place: Such a donation leaves the whole title in the donor, unless the event occurs which is to divest him: Here, however, there was an actual assignment, by which the donor, Mrs. Custance, transferred all her right, title, and interest to her niece; which was in itself sufficient to exclude the possibility of treating this as a *donatio mortis causâ*.

3. There must be a delivery of the subject of donation:

3. There must be a delivery of the subject of the donation. The general rule upon this head is, that to substantiate the gift, there must be an *actual* tradition or delivery of the thing to the donee himself (*n*), or to some one else for the donee's use (*o*).

(*n*) *Ward v. Turner*, 2 Ves. Sen. 431; *Irons v. Smallpiece*, 2 B. & A. 553; *Powell v. Hellicar*, 26 Beav. 261.

(*o*) *Drury v. Smith*, 1 P. Wms. 404.

The possession of it must be transferred in point of fact. The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor himself or by his order. Thus, in *Bunn v. Markham* (*p*), Sir G. Clifford had written upon the parcels containing the property in question the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees: It was, therefore, manifestly his intention that it should pass to them: yet as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift. An inchoate or imperfect delivery of chattels may be sufficient, and there is no distinction for this purpose between chattels and choses in action (*q*). An antecedent delivery made *alio intuitu* to the donee is sufficient (*r*).

what constitutes a delivery:

A further requisite to give effect to the donation is, that the deceased should, at the time of the delivery, not only part with the possession, but also with the dominion over the subject of the gift (*s*). Thus, in *Reddell v. Dobree* (*t*), A., the deceased, being in a declining state of health, delivered to Charlotte R. a locked cash-box, and told her to go at his death to his son for the key; and that the box contained money for herself, and entirely at her disposal after he was gone, but that he should want it every three months whilst he lived: The box was twice delivered to the deceased by his desire, and he delivered it again to Charlotte R., and it was in her possession at his death: The box was afterwards broken open by her, and contained a cheque for 500*l.*, drawn by a third party in favour of the deceased, and enclosed in a cover, endorsed with the name of Charlotte R., and the key (which the son of the deceased had refused to deliver to her) had a piece of bone attached to it, with her name written on it: Sir L. Shadwell, V.-C., held that there was no *donatio mortis causâ*; for that there was nothing more than that to a certain extent the deceased put Charlotte R. in possession of the box, but retained to himself the absolute power over the contents.

the deceased must part with the dominion as well as the possession:

But it is no objection that the gift was not made to the donee

but a trust may be

(*p*) 7 Taunt. 231.

(*q*) *Re Wasserberg*, [1915] 1 Ch. 195.

(*r*) *Cain v. Moon*, [1896] 2 Q. B. 283. See *Re Stoneham*, [1919] 1 Ch. 149.

(*s*) *Hawkins v. Blewitt*, 2 Esp. N. P. C. 663.

(*t*) 10 Sim. 244; *Treasury Solicitor v. Lewis*, [1900] 2 Ch. 812.

annexed to
the gift :

free from incumbrance, but charged with the performance of a particular purpose (*u*). Accordingly it was held in the case of *Hills v. Hills* (*v*), that a gift may be good as a *donatio mortis causâ*, although it be coupled with a trust that the donee shall provide for the funeral of the donor.

a delivery to
some one else
as agent for
the donor is
insufficient :

Again, though a delivery to a third party for the donee's use may be good (*x*), yet a mere delivery to an agent, in the character of agent for the giver, is not sufficient (*y*).

what is a
sufficient
delivery when
the subject is
incapable of
actual
transfer :

But there are cases where the nature of the thing will not admit of a corporeal delivery; and then, it would seem, that a delivery of the *means* of coming at the possession or making use of the thing given will be sufficient (*z*). Thus the delivery of the key of a trunk has been decided to amount to the delivery of a trunk and its contents (*a*). So the delivery of the key of a warehouse or other place, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for the purpose of a *donatio mortis causâ* (*b*). But in these cases it is to be observed, that the key is not to be considered in the light of a symbol, in the name of the thing itself; but the delivery of it has been allowed as the delivery of the possession, because it is the *way* of coming at the possession or to make use of the thing (*c*).

there may be
a *donatio
mortis causâ* of
bank notes:
or of other
negotiable
instruments
which pass by
delivery :

Bank notes may be the subject of *donatio mortis causâ*, because the property is transferred by the delivery (*d*). And on the same principle it should seem that all negotiable instruments which require nothing more than delivery to pass to the donee the money secured by them may be the subjects of donations *mortis causâ*. For since it has been so adjudged of bank notes, there appears no reason why exchequer notes or promissory notes, payable to the bearer, or bills of exchange, or exchequer bills, endorsed in blank, should not have the capability: for in all those cases the property passes to the donee by delivery (*e*).

(*u*) *Blount v. Burrow*, 4 Bro. C. C. 75. See *Hambrooke v. Simmons*, 4 Russ. Ch. C. 25.

(*v*) 8 M. & W. 401; *Treasury Solicitor v. Lewis*, *ubi supra*.

(*x*) See *supra*, note (*o*).

(*y*) *Farquharson v. Cave*, 2 Coll. 356.

(*z*) *Ward v. Turner*, 2 Ves. Sen. 441.

(*a*) *Jones v. Selby*, Prec. Chan. 300; *Ward v. Turner*, 2 Ves. Sen. 441; *Re Wasserberg*, [1915] 1 Ch. 195.

(*b*) *Ward v. Turner*, 2 Ves. Sen. 443; *Smith v. Smith*, 2 Stra. 955.

(*c*) *Ward v. Turner*, 2 Ves. Sen. 443; *Bunn v. Markham*, 7 Taunt. 224.

(*d*) *Miller v. Miller*, 3 P. Wms. 356.

(*e*) 1 Rep. Leg. 16, 3rd edit. Unendorsed negotiable instruments.

It has, however, been held in *Re Leaper* (f), that a donor's own promissory note cannot be the subject of a *donatio*. In that case Sargant, J., said he could not find any instance of a gift of the donor's own promissory note or his uncashed cheque held to be effective as a *donatio mortis causâ*, except perhaps in the case of *Bromley v. Brunton* (g), which, as explained in *Re Beaumont* (h), was not in itself an authority that a gift of one's own cheque is in itself sufficient. There is, moreover, also a *dictum* of Abbott, C. J., in *Holliday v. Atkinson* (i), that a donor's own promissory note is not the proper subject-matter of a *donatio mortis causâ*, and the observations of Bowen, L. J., in *Re Hughes* (k), are to the same effect.

So a bond may be a subject of *donatio mortis causâ*, because the property is considered to pass by the delivery (l).

It has been a matter of considerable discussion, whether a mortgage can be the subject of a *donatio mortis causâ* by delivery of the mortgage deeds: but the question may now be

payable to order may be the subject of a *donatio mortis causâ*. Thus, a promissory note payable to order may be the subject of a *donatio mortis causâ*, and will pass thereby *though unendorsed by the donor*: *Veal v. Veal*, 27 Beav. 303. See also *Rankin v. Weguelin*, 29 L. J. Ch. 323, note. This was expressly followed in the case of *Re Mead*, 15 C. D. 651, in which a testator shortly before his death gave to his wife two bills of exchange which were payable to himself or order; they did not fall due until after his death, and they had not been endorsed by him. It was held that there had been a valid *donatio mortis causâ* of the bills. A cheque payable to the donor or order, and without having been endorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order: *Clement v. Cheesman*, 27 C. D. 631. But the ground on which unendorsed negotiable instruments may be the subject of a *donatio mortis causâ* is not that a property is transferred at law by delivery, but that the property is so transferred by the delivery of the instrument as to give a title to the donee to the assistance of a Court of Equity to make the donation complete. It is in accordance with the principles laid down in the decision in the House of Lords in *Duffield v. Hicks*, 1 Bligh, N. S. 498, that unendorsed negotiable instruments have been held to be the subject of a *donatio mortis causâ*.

(f) [1916] 1 Ch. 579.

(g) L. R. 6 Eq. 275.

(h) [1902] 1 Ch. 889.

(i) 5 B. & C. 501.

(k) 59 L. T. 586.

(l) *Ashton v. Dawson*, 2 Coll. 363, note (c); *Snellgrove v. Baily*, 3 Atk. 214; *Ward v. Turner*, 2 Ves. Sen. 441, 442; *Gardiner v. Parker*, 3 Madd. 184, *ante*, p. 595. Such a donation cannot be regarded as a satisfaction of a debt due from the donor to the donee: *Clavering v. Yorke* (reported in a note to 2 Coll. 363); but there may be a *donatio mortis causâ* of the debt itself to the debtor: *Hurst v. Beach*, 5 Madd. 351; *Moore v. Darton*, 4 De G. & Sm. 517.

regarded as settled in the affirmative by the decision of the House of Lords in *Duffield v. Hicks* (u), where their Lordships held that the property in the deeds and the right to recover the money secured by them, passed by the delivery, followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee to make the gift effectual.

or of a policy
of insurance:

And in the case of *Witt v. Amis* (m), the Court of Queen's Bench held, that there was no distinction between a policy of insurance and a mortgage or bond, as regards its capability of being made the subject of a *donatio mortis causâ*, and, therefore, that a policy may be the subject of a gift of that nature. This decision was adopted by Romilly, M. R. (n), who held also to the same effect as to money due on a banker's deposit note (o).

or of a
banker's
deposit note:

or of a Post
Office Savings
Bank deposit
book:

securities: certifi-
cates of
investments:

The delivery of a Post Office Savings Bank deposit book may constitute a good *donatio mortis causâ* of the balance standing to the credit of the depositor (p); but where a deposit is invested by the Post Office Savings Bank for the depositor in Government Stock under the regulations contained in the deposit book, by having the stock placed on the Savings Bank Investment Account of the National Debt Commissioners and credited to the depositor, the delivery of the investment certificate and the deposit book cannot constitute a good *donatio mortis causâ* of the Government Stock (q). So also delivery of certificates of building society shares does not constitute a good *donatio mortis causâ* of the shares (r).

or receipt for
stock:

Where no property, legal or equitable, is transferred to the donee by delivery of the subject, there can be no valid *donatio mortis causâ*. Thus in *Ward v. Turner* (s), Lord Hardwicke

(u) 1 Bligh, N. S. 498. See also *Staniland v. Willott*, 3 Mac. & G. 676; *Re Dillon*, 44 C. D. 82; *Re Beaumont*, [1902] 1 Ch. 889.

(m) 1 Best & Sm. 109.

(n) *Amis v. Witt*, 33 Beav. 619.

(o) See accord. *Moore v. Moore*, L. R. 18 Eq. 474; *Re Dillon*, 44 C. D. 76. See further *Moore v. Darton*, 4 De G. & Sm. 517, in which case a receipt had been given by a borrower to a lender as follows: "Received of D. 500l., to bear interest at 4 per cent. per annum." And Knight-Bruce, V.-C., held that the delivery of this receipt to an agent of the borrower by the lender on his death-bed stating that he wished the debt to be cancelled was a sufficient *donatio mortis causâ*, on the ground, *semble*, that the document was essential to the proof of the contract of loan.

(p) *Re Weston*, [1902] 1 Ch. 680; *Re Andrews*, [1902] 2 Ch. 394.

(q) *Re Andrews*, *ubi supra*; but see *Re Lee*, [1918] 2 Ch. 394.

(r) *Re Weston*, *ubi supra*.

(s) 2 Ves. Sen. 431.

held that the delivery of *receipts* for South Sea annuities was not such a delivery of the annuities themselves as to support the gift of them as a *donatio mortis causâ*: but he intimated that an actual transfer of the stock would have been sufficient to effectuate the intended donation (*t*).

A promissory note made by a man in his last illness cannot operate as a *donatio mortis causâ* to the payee (*u*), for it has not that reference to the death of the donor which is essential to such a gift (*x*). The same has been decided as to a cheque on a banker; which is an order for the payment of money, that may take effect immediately, and in the lifetime of the donor; so that is (generally speaking) altogether inconsistent with the nature of a donation *mortis causâ* (*y*).

Notes drawn by the deceased in his last illness: not the subject of *donatio mortis causâ*, nor (generally speaking) cheques on bankers:

(*t*) Railway stock cannot be the subject of *donatio mortis causâ*: *Moore v. Moore*, L. R. 18 Eq. 474.

(*u*) *Re Leaper*, ante, p. 599; *Tate v. Hilbert*, 2 Ves. 111; *Hollday v. Atkinson*, 5 B. & C. 501. In the latter of these cases Lord Tenterden expressed his opinion that the intention to avoid the legacy duty would not be a sufficient consideration for a promissory note; for then the note would not be payable till after the donor's death: *ibid.* 503.

(*x*) See ante, p. 594.

(*y*) *Tate v. Hilbert*, 2 Ves. 120. See also *Tate v. Leithead*, Kay, 658; *Re Beaumont*, [1902] 1 Ch. 889; ante, p. 599. However, a cheque under some circumstances has been considered the subject of a *donatio mortis causâ*: as where the testator in his illness drew a bill on a goldsmith for the payment of a sum to A. the wife of B., and delivered it to A. with a written endorsement to buy her mourning: *Lawson v. Lawson*, 1 P. Wms. 441. (But see the remarks of Lord Loughborough in 2 Ves. 121.) So in *Bouts v. Ellis*, 17 Beav. 121 (affirmed on appeal, 4 De G. M. & G. 249), a testator, four days before his death, said to his wife, "I am a dying man; you will want money before my affairs are wound up": On the following day he gave his wife a crossed cheque, and on the next day but one, remembering that it was crossed, he asked a friend who visited him to take it and give the wife another for it, which the friend did: The testator's cheque was paid before, and the other cheque after his death: And it was held by Romilly, M. R., and by the Lords Justices, that the transaction constituted a good *donatio mortis causâ*. But the delivery of the donor's cheque on his banker, which was not presented before the donor's death, was held not a good *donatio mortis causâ*: *Hewitt v. Kaye*, L. R. 6 Eq. 198. Where the delivery by a donor, in his last illness, of a cheque on his bankers was accompanied by a delivery of his banker's pass-book, and the cheque was not presented until after the donor's death, it was held by Bacon, V.-C., that the gift was not a good *donatio mortis causâ*: *Re Beak's Estate*, L. R. 13 Eq. 734; *Re Mead*, 15 C. D. 651. Where a cheque was given by A. to B., and presented without delay, and the bankers had sufficient assets of A., but refused payment because they doubted the signature, and the next day A. died, the cheque not having been paid, it was held to be a complete gift *inter vivos* of the amount of the cheque: *Bromley v. Brunton*, L. R. 6 Eq. 275. See also *Rolls v. Pearce*, 5 C. D. 730, where a cheque drawn by a testator payable to his wife or her order, and endorsed by

How a *donatio mortis causâ* differs from a legacy.

It may now be expedient to examine in what respects a *donatio mortis causâ* differs from a legacy, and from a gift *inter vivos*; whence it will appear how important the distinction is between these three kinds of donations.

1. Probate unnecessary :

A *donatio mortis causâ* differs from a legacy in these respects.

1. Probate of it is unnecessary, for such a gift takes effect from delivery; so the donee claims the subject of it as a gift from the donor in his lifetime, and not under a testamentary act (z).

2. Executor's assent unnecessary.

2. For the reason just given, no assent or other act on the part of the executor or administrator is necessary to perfect the title of the donee (a). In fact the distinction between a *donatio mortis causâ*, and a legacy under a nuncupative Will, is, that the former is claimed against the executor, and the other, from the executor (b).

How it differs from a gift *inter vivos* :

A *donatio mortis causâ* differs from a gift *inter vivos*, in these respects (b), in which it resembles a legacy: 1. It is ambulatory, incomplete and revocable during the testator's life. The

1. It is revocable :

her and paid into a foreign bank against the amount of which she drew, was held to be a good *donatio mortis causâ*, although it was not presented for payment at the bank on which it was drawn until after the testator's death. The result of the cases on the question how far the gift of a cheque of the donor can be the subject of a *donatio mortis causâ* would seem to be that the mere delivery of a cheque which is not paid in the donor's lifetime does not constitute a *donatio mortis causâ*, for it is payment which constitutes the necessary delivery: *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Re Beak's Estate*, L. R. 13 Eq. 734; *Re Beaumont*, [1902] 1 Ch. 889. Whereas in the case of a bill, promissory note, bond, IOU, or cheque of a third person, it is the delivery of the instrument itself which operates as a delivery of the money secured by it. It is to be observed in the case of *Bouts v. Ellis* (*ubi supra*) that the cheque was paid before the death of the donor, and in *Lawson v. Lawson* (*ubi supra*), the gift by delivery of the bill was in the nature of an appointment. Generally, the giving of a cheque will not operate as an appropriation *inter vivos* in favour of the donee (*Hopkinson v. Forster*, L. R. 19 Eq. 74), although in *Bromley v. Brunton* (*ubi supra*) it was held on the facts of that case that there was a complete gift *inter vivos* of the amount of the cheque. There seem, however, to be some cases in which the delivery of a cheque which is not paid in the donor's lifetime is allowed to operate as a *donatio mortis causâ*. One of them would seem to be the case where the cheque is in the lifetime of the donor negotiated or paid away by the donee for valuable consideration (*Rolls v. Pearce*, 5 C. D. 730), or where the money is received immediately after the death of the testator before the banker was apprised of it: *Tate v. Hilbert*, 2 Ves. 111. But the gift would in these cases seem to be validated rather as a mere donation than as a *donatio mortis causâ*.

(z) 1 Rep. Leg. 12, 3rd edit.; *Rigden v. Vallier*, 2 Ves. Sen. 258.

(a) *Tate v. Hilbert*, 2 Ves. 120.

(b) There was formerly another point in which a *donatio mortis causâ* differed from a gift *inter vivos*, viz., that it might be made to the wife of the donor. This difference no longer exists since the Married Women's Property Act, 1882.

revocation may either be effected by the recovery of the donor from his disorder (*c*), or by resumption of the possession of the subject (*d*). But he cannot revoke the donation by a subsequent Will: for, on the death of the donor, the title of the donee becomes, by relation, complete and absolute from the time of delivery (*e*). It may, however, be satisfied by a legacy given to the donee (*f*) if the testator intended it so to be, but the mere fact of the legacy being of equal amount to the *donatio* does not in itself raise the presumption that it was intended to be in satisfaction of the *donatio* (*g*). 2. It is liable to the duties imposed on legacies, by the express provisions of the stat. 8 & 9 Vict. c. 76, s. 4, which enacts that every gift which shall have effect as a donation *mortis causâ* shall be deemed a legacy within the meaning of those Acts (*h*). The subject-matter of a *donatio* does not pass to the executor as such. If, therefore, he pays the estate duty upon it he can recover it from the donee. Such estate duty is not a testamentary expense and is therefore not payable by the executor under a direction to pay testamentary expenses out of residue (*i*). 3. It is liable to the debts of the testator upon deficiency of assets (*j*).

2. Liable to legacy duty:

3. To debts.

A *donatio mortis causâ* may be established solely on the evidence of the donee, if such evidence is considered trustworthy (*k*).

Evidence to establish a *donatio*.

A statement of claim alleging a *donatio mortis causâ* must state facts amounting to a *donatio mortis causâ* (*l*).

It may be added in conclusion that the Wills Act (1 Vict. c. 26) has not, either in words or in effect, abolished such donations (*m*).

Donatio mortis causâ not abolished by Wills Act.

(*c*) *Ante*, p. 595.

(*d*) *Ward v. Turner*, 2 Ves. Sen. 433; *Bunn v. Markham*, 7 Taunt. 232, by Gibbs, C. J.

(*e*) *Jones v. Selby*, Prec. Chanc. 300.

(*f*) *Jones v. Selby*, Prec. Chanc. 300. See *Johnson v. Smith*, 1 Ves. Sen. 314.

(*g*) *Hudson v. Spencer*, [1910] 2 Ch. 285.

(*h*) And by 44 Vict. c. 12, s. 38 (2), amongst the personal property to be included in the account on which probate duty was payable was "any property taken as a *donatio mortis causâ* made by any person dying on or after 1 June, 1881," and now by sect. 2 of the Finance Act, 1894, a *donatio mortis causâ* is liable to estate duty.

(*i*) *Re Hudson*, [1911] 1 Ch. 206.

(*j*) *Smith v. Casen*, mentioned in *Drury v. Smith*, 1 P. Wms. 406; *Ward v. Turner*, 2 Ves. Sen. 434.

(*k*) *Hayslep v. Gymer*, 1 Ad. & El. 162, and cases cited *ante*, p. 594, n. (cc).

(*l*) *Re Parton*, 45 L. T. 755.

(*m*) *Moore v. Darton*, 4 De G. & Sm. 517.

BOOK THE THIRD.

THE QUANTITY OF THE ESTATE IN ACTION OF AN EXECUTOR OR ADMINISTRATOR.

HITHERTO the subject as to the quantity of the estate of an executor or administrator has been confined to personal property of the testator or intestate *in possession*; that is, where he had not only the right to enjoy, but had the actual enjoyment of the thing. But property in chattels personal may also be in *action*; that is, where a man has not the occupation, but merely a right to occupy the thing in question; the possession whereof may, however, be recovered by a suit or action, from whence the thing so recoverable is called a thing, or *chose in action*.

Thus, if a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose in action*; for though the right to recover a recompense vests in me at the time of the damage done, yet there is no possession of it till recovered by course of law (*a*).

By the term *Chose in Action*, as used in this Treatise, is to be understood a right to be asserted, or property reducible into possession, either by action at law, or suit in equity (*b*).

(*a*) 2 Black. Comm. 397.

(*b*) A testator bequeathed a leasehold estate to trustees, upon trust as therein mentioned; and first, he charged the estate with the payment of an annuity to his daughter during all his interest in the estate: The daughter afterwards mortgaged her annuity, first to A. and afterwards to B.; but B. gave the trustees notice of his mortgage before A. did: And it was held by Sir L. Shadwell, V.-C., that the annuity was a chattel interest in equity, and not a *chose in action*, nor subject to any of the rules established with regard to assignment of *choses in action*; and consequently that B. had not gained any priority over A.: *Wiltshire v. Rabbits*, 14 Sim. 76. See also *Re Fraser*, [1904] 1 Ch. 111, and affirmed on appeal, [1904] 1 Ch. 726. Although a mortgage debt is a *chose in action*, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty, and leaseholds are real estate for the purposes of the rule: *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231.

The object of the present Book will be to investigate what *choses in action* the estate of an executor or administrator comprises: and the subject may perhaps be separated conveniently into these four divisions: 1st, to what *choses in action* an executor or administrator is entitled, which the deceased himself might have put in suit. 2ndly, as to the right of an executor or administrator to *choses in action*, where the action accrues after the death of the testator or intestate. 3rdly, as to the title of an executor or administrator to the executory and contingent interests of the deceased. 4thly, what suits, commenced by the testator or intestate, may be continued by the executor or administrator.

CHAPTER THE FIRST.

TO WHAT CHOSSES IN ACTION THE EXECUTOR OR ADMINISTRATOR IS ENTITLED, WHICH THE DECEASED MIGHT HAVE PUT IN SUIT.

IT may be advisable to treat of the subject of this chapter in two subdivisions: 1st, The general question as to what actions survive to the executor or administrator; 2ndly, Particular instances where the executor or administrator is entitled to *Choses in Action*, which the deceased might have put in suit, and where he is not so entitled.

SECTION I.

The General Question as to what Actions survive to the Executor or Administrator.

All personal actions founded on contract or duty, &c., survive:

With respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other *duty*, the general rule has been established from the earliest times, that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor or administrator (*a*). Therefore, it is clear that an executor or administrator shall have actions to recover debts of every description due to the deceased, either debts of record, as judgments, statutes, or recognizances, or debts due on special contracts, as for rents; or on bonds (*b*), covenants, and the like,

(*a*) 1 Saund. 216, *a*, n. (1) to *Wheatley v. Lane*. A cause of action arising out of a statutory duty to the deceased survives to his executors: *Peebles v. The Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159; *Darlington v. Roscoe*, [1907] 1 K. B. 219. The right of executors to sue is extended to administrators, by stat. 31 Edw. III. s. 1, c. 11.

(*b*) A Scotch heritable bond, although it contain a personal obligation to pay the debt, descends to the heir-at-law: *Jerningham v. Herbert*, 4 Russ. Chan. Cas. 388; *Allen v. Anderson*, 5 Hare, 163. See also *Cusi v. Goring*, 18 Beav. 383.

under seal; or debts on simple contracts, as notes unsealed, and promises not in writing, either express or implied (*c*). It is true that no action of account lay for an executor at common law, upon the principle that the account rested in the privity and knowledge of the testator only (*d*); but this action is since given to executors by the statute of Westm. 2 (13 Edw. I. stat. 1, c. 23), to executors of executors by 25 Edw. III. stat. 5, c. 5, and to administrators by 31 Edw. III. stat. 1, c. 11. So if the goods, &c., of the testator taken away continue in specie in the hands of the wrongdoer, it has been long decided that replevin and detinue will lie for the executor to recover back the specific goods, &c. (*e*); or in case they are sold, an action for money had and received to recover the value (*f*). So the executor of an assignee of a bail-bond might have brought an action upon it; for it was an interest vested which went to the executor (*g*).

The executor or administrator is the only representative of a deceased that the law will regard in respect of his personalties, and no word introduced into a contract or obligation can transfer to another his exclusive rights derived from such representation.

The representation of the deceased, in matters of contract, by his executor or administrator is so complete, that, generally speaking, it is not necessary, in order to transmit to the executor or administrator a right of enforcing a contract, that he should be named in the terms of it. Thus if money be payable to B., without naming his executor, yet his executor or administrator shall have an action for it (*h*). So if money be payable to A., or *his assigns*, his executor shall take it: for he is assignee in law (*i*). But where a man entered into an obligation, condi-

how far the executor represents the testator in his contracts:

representation of deceased by executor or administrator complete.

(*c*) Wentw. Off. Ex. 159, 14th edit.; Com. Dig. Administration (B.); Toller, 157.

(*d*) Co. Litt. 89, b; 2 Inst. 404.

(*e*) *Le Mason v. Dixon*, Sir W. Jones, 173, 174; 1 Saund. 217, note (1).

(*f*) 1 Saund. 217, note (1).

(*g*) *Nott v. Stephens*, Fortesc. 367; Com. Dig. Administration (B. 13).

(*h*) Com. Dig. Admon. (B. 13). Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent, and master and servant, the death of either party puts an end to the relation; and in respect of service after the death, the contract is dissolved unless there be a stipulation express or implied to the contrary: *Farrow v. Wilson*, L. R. 4 C. P. 745, 746.

(*i*) *Pease v. Mead*, Hob. 9; Wentw. Off. Ex. 215, 14th edit. But an executor of a vendor cannot sue the assign of a purchaser for breach of a restrictive covenant where the vendor had no interest in the adjoining land: *Formby v. Barker*, [1903] 2 Ch. 539; cf. *Ives v. Brown*, [1919] 2 Ch. 314.

tional to pay 20*l.* to such person as the testator should by his last Will appoint, and the testator made no particular appointment, it was held that his executors could not maintain an action for this 20*l.*: for though they were his assignees in law, yet the assignee here must be an assignee in deed (*k*). So if an annuity be given to B. without saying to his executors and administrators, during the life of the testator's wife, upon condition that he be civil to the wife, and B. dies before the wife, his executor shall not have it; for it was personal to B. (*l*).

Ancient common law rule
actio personalis moritur cum personâ.

But it was a principle of the common law, that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person to whom, or by whom the wrong was done. Thus where the action was founded on any malfeasance or misfeasance, was a tort, arose *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other cases of the like kind, where the *declaration* imputes a tort done either to the person or the property of another, and the *plea* under the old pleading must have been "not guilty," the rule was *actio personalis moritur cum personâ* (*m*). But this rule received considerable alteration by the statute 4 Edw. III. c. 7, *de bonis asportatis in vitâ testatoris*, which reciting, that in times past, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and so as such trespasses have remained unpunished, enacts, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were living.

Stat. 4 Edw.
III. c. 7.

And this remedy is further extended to executors of executors, by 25 Edw. III. stat. 5, c. 5, and to administrators by an equitable construction of the former statute (*n*). The Act 4 Edw. III. being a remedial law, has always been expounded

Stat. 25 Edw.
III. s. 5, c. 5.

(*k*) Hob. 9, 10; 1 Roll. Abr. 915, Executors (X.) pl. 2 *Quære*, however, whether the case is not now altered by sect. 27 of the Wills Act, 1837.

(*l*) *Neal v. Hanbury*, Prec. Chan. 173. See also *Barford v. Stuckey*, 1 Bing. 225.

(*m*) Pt. IV. Bk. II. Ch. I. § 1.

(*n*) This is stated by Mr. Serjeant Williams in 1 Saund. 217, to be by the stat. 32 Edw. III. c. 11: But that statute only gives an action to the administrator to recover as executor the *debts* due to the intestate. See Mr. Fraser's note to *Pinchon's Case*, 9 Co. 89, a.

largely: and though it makes use of the word *trespasses* only, has been extended to other cases within the meaning and intent of the statute (o). Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the *personal estate* of the deceased in his lifetime, *whereby it has become less beneficial to the executor* or administrator, as the deceased himself might have had, whatever the form of action may be (p). So that he now may have trespass or trover (q); an action against the sheriff for a false return in the lifetime of the testator (r); debt on a judgment against an executor suggesting a *devastavit* (s); an action for removing goods taken in execution before the testator (the landlord) was paid a year's rent (t); an action to recover the price paid by the intestate for valueless shares on the faith of a fraudulent prospectus (u); an action to restrain the infringement of a registered trade-mark with the usual claim for an account of profits and damages (x); an action for falsely and maliciously publishing a statement calculated to injure the right of property of the testator in a trade-mark (y), and other actions of the like kind for injuries done to the personal estate of the deceased in his lifetime (z). But if the

The executor may now have an action for all injuries to the personal estate, whereby it has become less beneficial to him, whatever the form of action may be.

(o) *Emerson v. Emerson*, 1 Ventr. 187; *Le Mason v. Dixon*, Sir W. Jones, 174. So Lord Ellenborough in *Wilson v. Knubley*, 7 East, 134, says, "It is a very ancient statute passed at a period when no great precision of language prevailed, and the body of the Act does not speak of actions on trespass, though the instance put is proper for such an action, but it speaks of actions for a trespass done to the testator's goods; and it enacts that executors in such cases shall have an action against the trespassers; apparently using the word *trespass* as meaning a wrong done generally, and the trespassers as wrongdoers."

(p) 1 Saund. 217, n. (1). See *Lockier v. Paterson*, 1 Carr. & K. 271.

(q) *Russell's Case*, 5 Co. 27, a; *Rutland v. Rutland*, Cro. Eliz. 377.

(r) *Williams v. Cary*, 4 Mod. 403: for this was not properly an injury done to the person of the testator, but it was an injury to his estate: 3 Bac. Abr. 98, Exors. (P. 2). See also *Spurstow v. Prince*, Cro. Car. 297.

(s) *Berwick v. Andrews*, 1 Salk. 314.

(t) *Palgrave v. Wyndham*, 1 Stra. 212.

(u) *Twyeross v. Grant*, 4 C. P. D. 40. Secus, however, where the claim is for unliquidated damages for misrepresentation, and there are no assets of the deceased belonging to the claimant at law or in equity: *Re Duncan*, [1899] 1 Ch. 387; *Phillips v. Homfray*, 24 C. D. 439, 455; *Davoren v. Wootten*, [1900] 1 Ir. R. 273. So a right of action against a director under sect. 84 of the Companies Act does not survive in the absence of proof that his estate has benefited: *Geipel v. Peach*, [1917] 2 Ch. 108.

(x) *Oakley v. Dalton*, 35 C. D. 700.

(y) *Hatchard v. Mege*, 18 Q. B. D. 771.

(z) 1 Saund. 217, note (1).

cause of action is in substance an injury to the person, the personal representative cannot maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury (*a*).

So an executor or administrator may have a *quare impedit* for a disturbance in the time of his testator or intestate, by the equity of the statute 4 Edw. III. c. 7 (*b*). So the personal representative of a termor may maintain ejectment, where the testator had a lease for years, or from year to year, whether the ouster was before or after his death (*c*). So he might have had debt on the statute for not setting out tithes due to the testator (*d*).

Actions for
torts to the
person or the
freehold do
not survive to
the executor.

But the statute of Edw. III. does not extend to injuries done to the person (*e*), or to the freehold of the testator. Therefore an executor or administrator shall not have actions of assault or battery, false imprisonment, libel (*f*), slander, deceit, nor (unless by virtue of the stat. 3 & 4 Wm. IV. c. 42, s. 2, hereafter to be mentioned) (*g*) for diverting a watercourse, obstructing lights, or other actions of the like kind: for such causes of action still die with the testator (*h*).

Where damages had been assessed against a co-respondent in a divorce suit and he died within a month after the decrees nisi ordering him to pay the money into Court, it was held that

(*a*) *Pulling v. Great Eastern Rail. Co.*, 9 Q. B. D. 110, 112; *Finlay v. Chirney*, 20 Q. B. D. 494, where the claim was for damages for breach of promise of marriage. See *Chamberlain v. Williamson*, 2 M. & S. 408; and *Quirk v. Thomas*, [1916] 1 K. B. 516; *post*, p. 619.

(*b*) *Wentw. Off. Ex.* 164, 14th edit.; *Smallwood v. Bishop of Coventry*, Cro. Eliz. 207; *S. C.*, Savil. 94, 118; *Owen*, 99; 1 *Lutw.* 1; 1 *And.* 241; 1 *Leon.* 205; 4 *Leon.* 15. It appears from the report of the case in *Lutwyche*, *Anderson*, and *Saville*, that the testator had only a chattel interest in the advowson: But, *semble*, that the law is the same where he was seised in fee; for the ground of the decision is, that the void term was a chattel which would have gone to the executor if the disturbance had not been: *Cro. Eliz.* 207. See *ante*, pp. 517, 518.

(*c*) *Slade's Case*, 4 Co. 95, *a*; *Moreton's Case*, 1 *Ventr.* 80; *Doe v. Porter*, 3 T. R. 13. He was held entitled to an *ejectione firmæ*: *Bro. Abr. Executors*, 45; *Russell v. Prat*, cited 1 *And.* 243; *Peytoe's Case*, 9 Co. 78, *b*.

(*d*) *Holl v. Bradford*, 1 *Sid.* 88; *Morton v. Hopkins*, 1 *Sid.* 407; *Moreton's Case*, 1 *Vent.* 30. But he could not enforce payment of tithes such as his testator never claimed: *Cart v. Hodgkin*, 3 *Swanst.* 160.

(*e*) See *Denman, J.*, in *Pulling v. G. E. Rail. Co.*, 9 Q. B. D. 110, 113.

(*f*) *Hatchard v. Mege*, 18 Q. B. D. 771.

(*g*) *Post*, p. 613.

(*h*) 1 *Saund.* 217, *a*, n. (1).

the cause of action did not survive, and that there was no remedy against his executor in the Divorce Court (*i*).

Since actions founded on wrongs to the freehold do not survive, it is clear that the executor cannot (unless by virtue of the statute just cited) maintain trespass *quare clausum fregit* (*j*), nor an action merely for cutting down trees (*k*), or other waste in the lifetime of the testator on his freehold (*l*). So if a man cut the growing corn of the testator and let it lie, no action can be maintained by the executor (*m*); but if the corn be cut and carried away (although he cannot have an action of trespass *quare clausum fregit* and *blada asportavit* (*n*)) he may have trespass *de bonis asportatis* on the statute of Edward III.: And even where the executor declared that the defendant *blada crescentia* upon the freehold of the testator *messuit defalcavit et asportavit*, it was held, in *Emerson v. Emerson* (*o*), that the action well lay, and that the allegation of *messuit* and *defalcavit* only described the manner of taking the corn away. It was said in that case, that if the *grass* of the testator be cut and carried away at the same time, no action will lie for the executor, because the grass is part of the freehold; but corn growing is a chattel (*p*): and the like distinction is taken in Wentworth's Office of an Executor (*q*) between a trespass in destroying or taking away corn growing, and a trespass in grass or wood growing; because though the testator should have died before severance, the corn would have gone to the executor (*r*), whereas the wood and grass would have gone to the heir. However, it should appear from the case of *Williams v. Breedon* (*s*), that an action may be maintained by an executor against the man who has cut down and

(*i*) *Brydges v. Brydges*, [1909] P. 187; and see *Coleman v. Coleman*, [1920] P. 71. So matrimonial suits abate on death of husband or wife: *Maconochie v. Maconochie*, [1916] P. 326; *Stanhope v. Stanhope*, 11 P. D. 103.

(*j*) Bro. Executor, pl. 120.

(*k*) *Williams v. Breedon*, 1 Bos. & Pull. 329.

(*l*) Godolph. Pt. 2, c. 22, s. 2. The executor of the lessor clearly could not formerly have had an action of waste (now abolished) for waste committed in the lifetime of the testator; for he had no right to recover the place wasted, the inheritance of which descended to the heir: Wentw. Off. Ex. 163, 14th edit.

(*m*) *Emerson v. Emerson*, 1 Vent. 187.

(*n*) *Ibid.*

(*o*) *Ibid.*

(*p*) See *ante*, p. 543 *et seq.*

(*q*) P. 166, 14th edit.

(*r*) See *ante*, p. 543 *et seq.*

(*s*) 1 Bos. & Pull. 330.

carried away the trees of the testator, for taking and carrying away "the goods and chattels, to wit, the wood, timber, and boughs, of the deceased in his lifetime." So where grass is mowed by a trespasser, and carried away as hay, an action of trover and conversion for so many loads of hay is doubtless maintainable by the executor (*t*).

Actions for
torts to
chattels real.

A distinction is suggested by the author of the Office of an Executor, with reference to the estate of the owner of land: for assuming that where the land is his freehold or copyhold inheritance, no action should be given to his executor for wood or grass destroyed in his lifetime; yet where he is but tenant for years, or tenant by extent, so that the very estate in the land was to come and is to come to the executor (together with *quicquid plantatur solo*), the executor or administrator, in the opinion of the author, ought to have, together with the estate in the soil, the action to punish the trespasser upon the soil (*u*).

In *Adam v. The Inhabitants of Bristol* (*x*), a point was raised with respect to this subject, which it ultimately became unnecessary for the Court to decide: viz., whether the executor of a lessee for years could in any case maintain an action against the Hundred, upon the stat. 7 & 8 Geo. IV. c. 31, s. 2, for an injury by rioters to the premises under lease sustained in the lifetime of the testator (*y*).

(*t*) Wentw. Off. Ex. 167, 14th edit. The author of that work expresses his opinion that the executor ought to be able to maintain an action on the statute Edw. III. in the case of meadow-grass consumed by the mouths of the cattle of a trespasser. The same author proceeds to distinguish the case of the testator dying before the time for mowing, and his surviving till the hay-time was clearly past: in the latter case, it is said, the executor certainly ought to have his action, because if the trespass had not been committed the grass would have been a chattel severed, and the personal estate would have been increased. See also on this question the judgment of Bowen, L. J., in *Phillips v. Homfray*, 24 C. D. 439, 455, as to actions for the recovery of property, or the profits, proceeds, or value of property, withdrawn by the deceased from the rightful owner.

(*u*) Wentw. Off. Ex. 169, 14th edit.

(*x*) 2 Adol. & Ell. 389.

(*y*) It was urged by the counsel for the plaintiff in this case, that the authorities show that an executor may sue for a trespass to a chattel real of his testator, inasmuch as it has been held that an executor may maintain ejectment, or *ejectione firmæ*, on the ouster of his testator (see *ante*, p. 610, and note (*c*), which are, in fact, actions of trespass): And *Peytoe's Case*, 9 Co. 78, *b*, was cited. There the Court referred to 7 Hen. IV. 6, *b*, as having decided that by force of the stat. 4 Edw. III. c. 7, which gives an action of trespass *de bonis asportatis in vitâ testatoris*, the executors shall have *ejectione firmæ in vitâ testatoris*, because that is an action of trespass. On reference to the Year Book itself, it appears that, in fact, the argument for the

By stat. 3 & 4 Will. IV. c. 42, s. 2, after reciting that no remedy is provided by law for injuries to the real estate of any person deceased, committed in his lifetime, for remedy thereof it is enacted, that an "action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the *real estate* (z) of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person (a), and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person" (b).

3 & 4 Will.
IV. c. 42, s. 2,
Executors,
&c. may
within a year
after the
death of the
testator, &c.
bring actions
for injuries to
real estate,
committed
within six
months before
the death.

By stat. 4 Will. & M. c. 24, s. 12, the executor or administrator of an executor or administrator who wasted or converted to his own use goods, chattels, or estate of his testator or intestate, was rendered liable and chargeable in the same manner as his testator or intestate should or might have been.

A further most important alteration in this part of the law has been effected by the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), which, after reciting that "no action at law is now

9 & 10 Vict.
c. 93.
[Lord Camp-
bell's Act]:

executor was that the statute enacts that executors shall have action for the goods taken from the possession of their testators, and the term is nothing but a chattel: And by Hankford: If tenant by elegit be disseised and dies, his executors shall have an action for that.

(z) *Quære*, whether these words apply to injuries to chattel interests in land, or whether a remedy is given by the stat. 4 Edw. III. c. 7. See *supra*, note (y).

(a) In an action where a sole plaintiff in an action for a mandatory injunction and damages for obstruction to the access of light to a freehold house had died more than six months after the issue of the writ, the executor and devisee obtained the common order to carry on proceedings. On motion to discharge this order for irregularity on the ground that the cause of action did not continue, and that there was no transmission of interest to the executor, it was held that though any action by the executor for injury to the plaintiff's *real estate* might under this section be limited to the six months prior to the plaintiff's death, still he could recover damages to this extent. As to the claim for mandatory injunction, it was held that this devolved on the executor in his right as devisee, and that consequently he could maintain such claim: *Jones v. Simes*, 43 C. D. 607. *Quære*, whether the Land Transfer Act, 1897, enlarges the rights of personal representatives in respect of wrongs to real estate.

(b) See as to the liability of the executors of a tenant for life as regards waste under this statute, *Woodhouse v. Walker*, 5 Q. B. D. 404; *Re Cartwright*, 41 C. D. 532; *Jenks v. Viscount Clifden*, [1897] 1 Ch. 694; and *post*, Pt. IV. Bk. II. Ch. I. § 1. The executors of a tenant for life of leaseholds are not liable to the remainderman for permissive waste: *Re Parry and Hopkin*, [1900] 1 Ch. 160.

an action to be maintainable against any person causing death through neglect, &c., notwithstanding the death of the person injured:

action to be for the benefit of certain relations, and shall be brought by and in the name of

maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injuries so caused by him": enacts, "whosoever the death of a person (c) shall be caused by wrongful act, neglect, or default; and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

By sect. 2, "Every such action shall be for the benefit of the wife, husband, parent, and child (d) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages (e)

(c) *The Explorer*, L. R. 3 Adm. 289, where it was held that the provision of the above Act extended to a case where the person, in respect of whose death damages were sought to be recovered, was an alien, and was at the time of the wrongful act, neglect, or default which caused his death, on board a foreign vessel on the high seas. The provisions of the Fatal Accidents Acts, 1846 and 1864, were held by Darling, J., not to apply for the benefit of aliens abroad: *Adam v. British and Foreign Steamship Co.*, [1898] 2 Q. B. 430. This decision was, however, dissented from by Kennedy, J., and Phillimore, J., in *Davidsson v. Hill*, [1901] 2 K. B. 603.

(d) This does not extend to a bastard child: *Dickinson v. North-Eastern Railway*, 2 Hurlst. & C. 735.

(e) In assessing damages there cannot be taken into account any sum paid or payable on the death of the deceased under any contract of insurance: 8 Edw. VII. c. 7; nor can the jury take into consideration mental suffering or loss of society, nor expenses incurred by the funeral or mourning: *Dalton v. South-Eastern Rail. Co.*, 4 C. B. N. S. 296; *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648; but must give compensation for pecuniary loss only: *Blake v. Midland Rail. Co.*, 18 Q. B. 93. But legal liability alone is not the test of injury, in respect of which damages may be recovered: The reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned: *Franklin v. South-Eastern Railway*, 3 H. & N. 211; *Dalton v. South-Eastern Railway*, 4 C. B. N. S. 296; *Duckworth v. Johnson*, 4 H. & N. 653; *Pym v. Great Northern Railway*, 4 Best & Sm. 396; *Sykes v. North-Eastern Rail. Co.*, 44 L. J. C. P. 191; *Hetherington v. North-Eastern Rail. Co.*, 9 Q. B. D. 160. It should be observed that the statute gives to the personal representative a cause of action beyond that which the deceased would have, if he survived, and based on a different principle: for the condition, that the action could have been maintained by the deceased if death had not

as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct (f).

Sect. 3. "Not more than one action shall lie for and in respect of the same subject-matter of complaint: and that every such action shall be commenced within twelve calendar months after the death of such deceased person" (g).

Sect. 4. "In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered" (h).

executor or administrator of the deceased :

only one action shall lie, and to be commenced within twelve months :

plaintiff to deliver a full particular of the person for whom such damages are claimed :

ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of: *Pym v. Great Northern Rail. Co.*, 2 Best & Sm. 767; 4 Best & Sm. 406. It must be further observed, that the remedy given by the statute is to individuals, and not to a class; and therefore, on the death of a person whose income arose from land and personalty, independent of any exertion of his own, no portion of which was lost to his family by his death, the action is maintainable, if, in consequence of that death, the mode of distribution among the members is changed: 4 Best & Sm. 396. If, however, there is no evidence of actual pecuniary damage (in the sense above explained), the action will fail: *Duckworth v. Johnson*, 4 H. & N. 652. If the personal representative of a deceased person brings an action under this Act, it is a good defence that the defendants paid to such deceased person in his lifetime, and he accepted a sum of money in full satisfaction and discharge of all claims and causes of action he had against the defendants: the cause of action being defendant's negligence, which has been satisfied in the lifetime of the injured person, and his death does not create a fresh cause of action: *Read v. Great Eastern Railway*, L. R. 3 Q. B. 555.

(f) In a case where a sum of money was received from a railway company by way of compensation by the executors of a person whose death had resulted from injuries received in an accident on the railway, no action having been brought under Lord Campbell's Act, the executors brought an action in the Chancery Division, to which all the relatives referred to in sect. 2 of the Act were parties, asking for a declaration as to the persons entitled to the money. The Court held that it could distribute the fund amongst such of the relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under the Act: *Bulmer v. Bulmer*, 25 C. D. 409.

(g) See *The Alma*, [1903] P. 55.

(h) See *Chapman v. Rothwell*, 1 E. B. & E. 168, as to the form of the declaration.

construction
of Act.

Sect. 5. "The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter: that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word 'person' shall apply to bodies politic and corporate; and the word 'parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word 'child' shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter."

27 & 28 Vict.
c. 95. Where
no action
brought by
the executor
within six
months, it
may be
brought by
the persons
beneficially
interested in
the result.

By the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 1, it is enacted, that if it shall happen that no action such as is mentioned in statute 9 & 10 Vict. c. 93, shall be brought by the executor or administrator of the deceased within six months after the death, such action may be brought by and in the name of the persons for whose benefit such action would have been, if it had been brought in the name of the executor or administrator (i).

The question has been raised as to whether, in a case where a person has brought an action as administratrix of the deceased under Lord Campbell's Act (the Fatal Accidents Act, 1846), and has obtained judgment and been paid damages as such administratrix in full satisfaction, and discharge, of the judgment and causes of action, the same administratrix is entitled to bring another action as administratrix, outside the provisions of such Act, in respect of the assets and estate of the deceased, and whether an admission on the record made in the action under the Act can be set up in the other action, so that the defendants, who have submitted in the action under the Act, are to be precluded from denying the facts alleged in the other action. It was decided in *Leggott v. Great Northern Rail. Co. (j)*, that inasmuch as the entire object and effect of the two actions are totally different and they are brought in different rights (although the machinery nominally is the same), the

(i) By sect. 2, money may be paid into Court in one sum. An action cannot be brought under the Act unless commenced within the six months limited by the Public Authorities' Protection Act, 1893: *Williams v. Mersey Docks, &c. Board*, [1905] 1 K. B. 804.

(j) 1 Q. B. D. 599.

administratrix, in the action under the Act suing, not in respect of anything which belonged to the deceased, but by force of the statute which enacts that the deceased's death is to be made the subject of an action, just as if he had lived, the second action is not barred by the judgment and satisfaction in the action under the Act, and that there is no estoppel of which either party can take advantage.

Akin to the right of action by an executor or administrator under the Fatal Accidents Act of 1846 is that of the legal personal representative of a deceased workman against his employer under stat. 43 & 44 Viet. c. 42 (Employers' Liability Act, 1880), which enacts "where after the commencement of this Act personal injury is caused to a workman" in any of the various ways mentioned in sect. 1, "*the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.*"

Sect. 2 enumerates cases in which the workman shall not be entitled to any right of compensation or remedy under the Act.

Sect. 3 limits the amount of compensation recoverable under the Act.

By sect. 4, an action under the Act shall not be maintainable unless notice that the injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, *within twelve months from the time of death*: provided always, that, in case of death, the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

By sect. 5, money payable under any penalty is to be deducted from compensation awarded.

Sect. 6 assigns the trial of actions under the Act to the County Court (subject to removal into the Superior Court).

Sect. 7 deals with the contents of the notice of injury required by the Act, and the mode of service.

The Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), was passed with a view to amending the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment. In case of death, the compen-

Employers' Liability Act, 1880. Stat. 43 & 44 Viet. c. 42.

Sect. 1.

Sect. 2.

Sect. 3.

Sect. 4.

Sect. 5.

Sect. 6.

Sect. 7.

Workmen's Compensation Act.

sation payable under the Act is, by the First Schedule, made payable to the workman's legal personal representative, or, if he has none, to or for the benefit of his dependants; and if the payment is made to the legal personal representative, it is to be paid by him to or for the benefit of the dependants or other person entitled under the Act (*k*).

The right of a dependant of a deceased workman to make a claim and take proceedings under the Act passes to the executor of the dependant even though he has died without having made a claim (*kk*).

Actions *ex*
quasi con-
tractu.

It must be observed, that if the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action, at common law, to recover such damage, although the action is in some sort founded on a tort. Thus in *Knights v. Quarles* (*l*), where an administrator declared in *assumpsit* against an attorney for negligence in investigating a title about to be conveyed to the intestate, and the declaration went on to allege special damage to the personal estate; the defendant demurred; and it was urged on his behalf, that the action, though in form *ex contractu*, was in substance *ex delicto*, the breach of promise complained of being no more than a *tort* arising out of a neglect of duty: But the Court were of opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer: that it made no difference in this case whether the promise was express or implied, the whole transaction resting on a contract; that though, perhaps, the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action should be maintained, or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury: It was further observed, that if a man contracted for a safe

(*k*) The option of the workman is to claim compensation under the Act, or damages at common law or under the Employers' Liability Act, 1880. But a claim made under the Act of 1906 and withdrawn is not a bar to a subsequent action for damages under the Act of 1880: *Rouse v. Dixon*, [1904] 2 K. B. 628.

(*kk*) *United Collieries v. Simpson*, [1909] A. C. 383.

(*l*) 2 Brod. & Bingh. 102.

conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured—though it was clear he, in his lifetime, might, at his election, sue the coach proprietor in contract or in *tort* (*m*), it could not be doubted that his executor might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract (*n*).

The above rule of the common law that *actio personalis moritur cum personâ* seems never to have been applied by the old authorities to causes of action on contracts: On the contrary, those authorities are uniform, that this maxim is always to be understood of a *tort*, and that the personal representative may sue, by the common law, not only for all debts due to the deceased by specialty or otherwise, but for all covenants and indeed all contracts with the testator *broken in his lifetime* (*o*). And the reason appears to be that these are *Choses in Action*, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the deceased, and is in law his assignee (*p*). But these authorities have been limited by modern decisions hereafter to be mentioned, and must, at this day, be understood with some qualification.

A qualification has, in the first place, been introduced by the case of *Chamberlain v. Williamson* (*q*), which seems to have

Whether the rule *actio personalis moritur cum personâ* can ever be applied to actions on contracts:

where the breach of contract was an

(*m*) As to what actions of this character are founded upon tort and contract respectively, see *Taylor v. Manchester, &c. Rail. Co.*, [1895] 1 Q. B. 134; *Kelly v. Metropolitan Rail. Co.*, *ibid.*, p. 944; *Meux v. Great Eastern Rail. Co.*, [1895] 2 Q. B. 387.

(*n*) See accord. *Alton v. Midland Rail. Co.*, 19 C. B. N. S. 242, per Willes, J., and *Bradshaw v. Lancashire and Yorkshire Rail. Co.*, L. R. 10 C. P. 189; but as to the latter case, see the observations made by Mellor and Quain, JJ., in *Leggott v. Great Northern Rail. Co.*, 1 Q. B. D. 599.

(*o*) See Com. Dig. Administration (B. 13); Covenant (B. 1); Bac. Abr. Exors. (N.).

(*p*) *Raymond v. Fitch*, 2 Crompt. Mees. & Rosc. 588, 597; *ante*, p. 607.

(*q*) 2 Maule & Selw. 408. For the converse of this case, see *Finlay v. Chirney*, 20 Q. B. D. 494, where it was held that an action for breach of promise of marriage where no special damage is alleged, does not survive against the personal representatives of the promisor. It is doubtful, however, whether such an action will lie even if special damage be proved. The sounder view seems to be that such an action will not lie in any case after the death of the promisor: *per* Swinfen Eady, L. J., in *Quirk v. Thomas*, [1916] 1 K. B. 516. But assuming that it would, the loss to the plaintiff through having given up her business at the request of the deceased would not prevent the action being a personal action, and the loss would not be special damage: *Ibid.*

injury to the
person :

established that no action is maintainable by the executor or administrator upon an express or implied promise to the deceased, where the damage consisted entirely in the personal suffering of the deceased, without any injury to his personal estate. "Executors and administrators," said Lord Ellenborough in that case, "are the representatives of the personal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." Accordingly it was there held, that an executor or administrator cannot have an action for a breach of promise of marriage to the deceased, where no special damage to the personal estate can be stated on the record (*r*). So with respect to injuries affecting the life and health of the deceased, such, for instance, as arise out of the unskilfulness of medical practitioners, or the imprisonment of the party brought on by the negligence of his attorney, generally speaking, no action can be sustained by the executor or administrator on a breach of the implied promise by the person employed to exhibit a proper portion of skill and attention: such cases being, in substance, actions for injuries to the person (*s*).

actions upon
covenants
real :

A further qualification of the old authorities has taken place in respect of contracts relating to the freehold.

It has been settled, from the earliest times, that the right to sue upon covenants real will in many cases descend to the heirs of the covenantee, or go to his assignee, to the exclusion of the executor. Thus, if a feoffment be made in fee, and the feoffor covenants to warrant the lands or otherwise, to the feoffee and his heirs, in this case the heir of the feoffee shall take advantage of the covenant (*t*). So the interest in a covenant to levy a fine has been taken to be an inheritance descending to the heir of the covenantee (*u*). And the heir may have an action on a covenant real, although nothing has descended on him from the ancestor, with which the covenant can run: As if A. covenant with B. and his heirs to infeoff B. and his heirs, and B. dies

(*r*) It appears also that in the year 1813, a case of *Administrator of Tewtry v. O'Regan* came before the Court of Exchequer in Ireland, in which it was held, that the action was not maintainable. See also *ante*, p. 610, n. (*u*), and *supra*, n. (*q*).

(*s*) *Chamberlain v. Williamson*, 2 M. & S. 415, 416. See *ante*, pp. 609, 610, 613 *et seq.*, as to the cases where actions of this kind are maintainable.

(*t*) Touchst. 175.

(*u*) *Winter v. D'Evreux*, 3 P. Wms. 189, n. (B).

before it be done, in this case his heirs shall take advantage of it (x). So where three coparceners purchased land in fee and mutually covenanted for them and their heirs, with them and every of them and their heirs, that the survivors should convey to the heirs of such as should die first, it was resolved that this was a real covenant, and went to the heir of the covenantee (y). And a covenant which runs with the land will go to the heir, not only without naming him, but where it is made with the covenantee and *his executors* (z).

But if such a covenant *had been broken in the lifetime of the testator, or intestate*, it would seem, according to the old authorities before mentioned, that the rule was, that the executor or administrator might sue upon it (a).

This rule, however, has been directly qualified by the decision of the case of *Kingdon v. Nottle* (b), followed by that of *King v. Jones* (c), in which cases it was held that where there are covenants real, that is, which run with the land, and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff (d).

where a formal breach only has taken place in the testator's lifetime, but the substantial damage has arisen since his death :

But it was admitted by the judges, in these cases, that when the *ultimate damage* is sustained in the lifetime of the ancestor, as where he is evicted, and the land, and consequently the covenant, does not descend to the heir, there the executor only can sue upon the covenant (e). And the Court, with this distinction, recognized the decision of *Lucy v. Levington* (f), where it was held that the executor might recover for a breach, in his testator's life, of a covenant for quiet enjoyment.

In the before mentioned case of *Knights v. Quarles* (g), an action of *assumpsit* was brought by an administrator, against

actions on contracts not under seal

(x) Fitz. N. B. 145, C.; Touchst. 175.

(y) *Wooton v. Cooke*, Jenk. 241.

(z) *Lougher v. Williams*, 2 Lev. 92; *Vivian v. Campion*, 1 Salk. 141.

(a) See also Comyn's Dig. tit. Covenant (B. 1); and Wentw. Off. Ex. 160, 14th edit.

(b) 1 M. & S. 355. See also 4 M. & S. 53.

(c) 5 Taunt. 418: affirmed in error in 4 M. & S. 188.

(d) It was held by Mr. Justice Bayley, in the case of *Kingdon v. Nottle*, 1 M. & S. 362, that if the executor could allege in his declaration that the testator was prevented from selling the estate by the assigned breach of the covenant, perhaps he might maintain the action.

(e) 1 M. & S. 365, 366; 5 Taunt. 427.

(f) 2 Lev. 26.

(g) 2 Brod. & B. 102; *ante*, p. 618.

relating to
land :

an attorney, for negligence in investigating a title about to be conveyed to the intestate, by means of which the premises were conveyed to him with a bad title; and the declaration went on to aver, that the intestate was thereby unable to sell the property, and alleged special damage to the personal estate: It was objected, on demurrer to the declaration that this was a contract regarding land on which an administrator could not sue: But the Court of Common Pleas unanimously held the action well brought.

In *Orme v. Broughton* (*h*) the declaration, in an action of *assumpsit* by an administrator, alleged that in consideration that the deceased had agreed to buy certain land of the defendant at a certain price, and had paid him part thereof, as deposit money, the defendant promised the deceased to furnish an abstract of a good title to the land, in sufficient time for the completion of the purchase by a day specified, and that he was requested by the deceased to furnish it, and failed; by means whereof the deceased lost the benefit of the purchase, and was put to expense in endeavouring to procure the said title, and was deprived of the use of the money deposited. The Court of Common Pleas held that the plaintiff was entitled to judgment; for that there appeared on the face of the record a personal contract, a breach of it in the lifetime of the intestate, and a loss to his personal property: And that it was clear the heir could not sue the defendant; for in all the cases where the heir had sued, the action had been on a covenant: but he could have no right of action on a mere agreement to sell.

whether an
executor may
sue on a con-
tract broken
in the testa-
tor's life,
where no
damage to
the personal
estate can be
stated :

It was held in *Raymond v. Fitch* (*i*) that the case of *Chamberlain v. Williamson* (*k*) did not justify an inference, that the right of an executor or administrator to sue on a breach of contract made with the deceased is confined to cases in which such breach can be stated as a damage to the personal estate.

The authority of this decision was fully confirmed and acted on in the subsequent case of *Ricketts v. Weaver* (*l*), in which it was held that an executor of a tenant for life may sue for a breach, incurred in the testator's lifetime, by his lessee, of a covenant to repair, without averring any damage to his personal

(*h*) 10 Bingh. 533.

(*i*) 2 Crompt. M. & R. 588. See also *Morley v. Polhill*, 2 Vent. 56; and *Smith v. Simonds*, Comberb. 64.

(*k*) *Ante*, p. 619.

(*l*) 12 M. & W. 718.

estate:—And the result of the case of *Raymond v. Fitch* was stated by Parke, B., to be, that unless it be a covenant in which the *heir alone* can sue (according to *Kingdon v. Nottle* (m) and *King v. Jones* (n)) for a breach of the covenant in the lifetime of the testator, the executor can sue, except it is a mere personal contract, in which the rule applies that *actio personalis moritur cum personâ*.

An action will lie for an executor or administrator upon a promise made to the deceased for the exclusive benefit of a third party: Thus, where A. promised to B. that if B. would pay 50*l.* to C., his son, who was married to D., the daughter of A., that then he would pay 100*l.* to D., his daughter, at such a time; B. paid the 50*l.* to C., and A. failed of the payment of the 100*l.*: B. died intestate; E., his administrator, brought an action upon the case upon *assumpsit*, upon the promise made to B., the intestate; and it was adjudged that the action did well lie by the administrator, although he should have no benefit by it if he did recover (o).

Wherever the reversion is for years, the executor or administrator is of course the only party capable of suing on a covenant made with the lessor, whether it run with the land or be in gross (p). An executor of tenant for years is expressly within the statute of 32 Hen. VIII. c. 34, and may maintain covenant against the assignee of the reversion.

actions on
covenants by
executor of
reversioner
for years:

And since the Land Transfer Act, 1897, in the case of a lessor dying on or after the 1st January, 1898, wherever the reversion is real estate within the Act, the executor or administrator is the only party capable of suing on a covenant made with the lessor until assent or conveyance under sect. 3 (1) of the Act.

and before
assent or
conveyance,
where rever-
sion is real
estate within
the Land
Transfer Act,
1897.

SECTION II.

Particular instances where the Executor or Administrator is entitled to Choses in Action which the Deceased might have put in Suit, and where he is not so entitled.

The cases hitherto collected on this subject have been pointed out merely to develop the general principles as to the right of

(m) *Ante*, p. 621.

(n) *Ante*, p. 621.

(o) *Bafield v. Collard*, Sty. 6.

(p) *Roscoe on Actions*, 442. See *Mackay v. Mackreth*, 2 Chitt. Rep. 461.

executors and administrators to the *choses in action*, on which the deceased himself might have sued. It remains to advert to some particular instances respecting this portion of an executor's or administrator's estate, as well in which his title has been denied as where it has been established.

Annuities:

First, as to annuities. An annuity is a yearly payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only (*q*). As it concerns no land, it is so far considered personal property, that although granted to a man and his heirs or the heirs of his body, it is not an hereditament within the Statute of Mortmain, 7 Edw. I. stat. 2 (*r*), nor entailable within the statute *de donis* (*s*); and Lord Coke calls an annuity granted to a man and his heirs a fee simple *personal* (*t*). But in one respect, most important to the present subject, an annuity partakes of the nature of real property: viz., that when granted *with words of inheritance*, it is descendible, and goes to the heir to the exclusion of the executor, not being assets in the executor (*u*). Unless, however, words of inheritance are employed in the grant, it has been held that the annuity will pass to the executors as personal estate: As where a testator gave his real and personal estate to his wife, subject, amongst other bequests, to an annuity of 50*l.* to A. B. *for ever*; and it was held, that for the want of the word *heirs* in the gift, the annuity passed, on A. B.'s death, to his personal representative (*x*).

There have been several decisions on the question whether annuities are to be considered real or personal estate. In *Lord Stafford v. Buckley* (*y*), Lord Hardwicke decided that an annuity in fee of 1,000*l.*, granted by King Charles the Second out of the Barbadoes duties, was not a realty within the statute *de donis*, or Statute of Frauds: and his Lordship said it was a personal inheritance, which the law suffers to descend to the heir, and which can be alienated by the grantee (*z*). In *Lady*

(*q*) Co. Litt. 144, *b*.

(*r*) Co. Litt. 2, *a*, note (1), by Hargrave.

(*s*) Co. Litt. 20, *a*, and note (4), by Hargrave.

(*t*) Co. Litt. 2, *a*.

(*u*) *Turner v. Turner*, Ambl. 782, 783; *Stafford v. Buckley*, 2 Ves. Sen. 179.

(*x*) *Taylor v. Martindale*, 12 Sim. 158; *Parsons v. Parsons*, L. R. 8 Eq. 260.

(*y*) 2 Ves. Sen. 171.

(*z*) 2 Ves. Sen. 178. Cf. *Turner v. Turner*, 1 Bro. C. C. 316, 325; *Re Rivett-Carnac*, 30 Ch. D. 133, 141.

Holderness v. Lord Carmarthen (a), Lord Thurlow held that an annuity of 4,000*l.* charged upon the Post Office, until a sum of 100,000*l.* should be paid, in order to be laid out in land, was a mere personal annuity. In *Aubin v. Daly* (b), it was held by the Court of Queen's Bench, with respect to the same annuity which was the subject of Lord Hardwicke's decision in *Lord Stafford v. Buckley*, that the annuity was personal property and duly passed under a Will attested by two witnesses, by a residuary clause bequeathing all the rest, residue and remainder of the personal estate, of what nature or kind soever, to the executors (c).

These cases of personal annuities in fee seem to form an exception to two general rules: the one, that, before the Wills Act (1 Vict. c. 26) came into operation, what would devolve upon the heir could not be devised from him, but by a Will attested according to the Statute of Frauds: and the other, that though personalty be specifically bequeathed, it will in the first instance vest in the executor, and form part of his estate.

Personal annuities in fee, being personal estate, are not affected by sect. 1 (1) of the Land Transfer Act, 1897.

In the cases of annuities above mentioned, the foundation of the decision that they were personal property was, that they were in no way connected with land. But where an inheritance is granted, which arises out of land, it is considered real property. In *Buckeridge v. Ingram* (d), shares in the navigation

Canal shares,
&c.

(a) 1 Bro. C. C. 377.

(b) (1820), 4 Barn. & Ald. 59.

(c) But where the testator devised his freehold estates to A. & B. and their heirs in trust, to permit his wife to hold and enjoy the same, and to receive the rents thereof for her life; and after her decease, in trust to permit his nephew, his heirs and assigns, to hold and enjoy the estates and to receive the rents thereof for ever, but subject to the payment of 20*l.* yearly for ever, to his niece, her executors, administrators, and assigns; with the payment of which sum the testator made chargeable his said estates, in manner and form aforesaid, immediately after the decease of his wife; *Shadwell, V.-C.*, held, that the niece took a legal rent-charge of 20*l. per annum* in fee: *Ramsay v. Thorngate*, 16 Sim. 575. Prior to the abolition of real actions by the stat. 3 & 4 Will. IV. c. 27, s. 36, no action of debt lay for the recovery by the grantee from the terre-tenant of a rent-charge in fee. Since that statute an action of debt will lie: *Thomas v. Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn and District Building Society*, 42 C. D. 343, 349; *Searle v. Cooke*, 43 C. D. 529. But not against a tenant for years in occupation of the land: *Re Herbage Rents*, [1896] 2 Ch. 811. As to arrears of rent-charge which became payable during the lifetime of the testator or intestate, see *post*, pp. 632, 633.

(d) 2 Ves. 653.

of the river Avon, under the statute 10 Anne, were held real estate (e). So in *Howse v. Chapman* (f), a share in the Bath Navigation was held to be real property, which descended to the heir: and the same was holden as to a New River share (g). But in *Bligh v. Brent* (h) the Court of Exchequer held that shares in the Chelsea Water Works were to be considered as personal property. And it has been usual of late years when Acts of Parliament are obtained for the making of Navigable Canals, and similar works, to procure a clause to be inserted, directing that the shares shall be deemed to be personal estate (i).

Shares under
Companies
Acts.

By sect. 22 of the Companies (Consolidation) Act, 1908, it is enacted that "the shares or other interest of any member "in a company shall be *personal estate* transferable in manner "provided by the articles of the Company, and shall not be of "the nature of real estate" (j).

Stock in the
public funds:

It is here necessary to notice the rights of executors and administrators with respect to property in the public funds. The statute 1 Geo. I. stat. 2, c. 19, after creating a capital or joint-stock, on which annuities at the rate of 5 per cent. were to be attending, declares (sect. 9), "that all persons who shall be entitled to any of the said annuities, and all persons lawfully claiming under them, shall be possessed thereof, *as of personal estate, and the same shall not descend to the heir*:" It then enacts (sect. 11), that no method of assigning or transferring the stock, other than that pointed out by the Act, shall be good and available in law; and it is provided by the 12th section, that any person possessed of the stock, with the annuity attending the same, may devise the same by writing, attested by two witnesses, but that no such devisee shall receive payment, till so much of the devise as relates to the stock be entered in the proper office at the Bank; and in default of such devise, the stock and annuities attending the same shall go to the executor and administrator.

(e) *Portmore v. Bunn*, 1 B. & C. 699, 702. (f) 4 Ves. 543.

(g) *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Davall v. New River Co.*, 3 De G. & Sm. 394. A lease of a lighthouse, and the tolls thereof, by the Corporation of Trinity House, has been held to be a chattel real: *Ex parte Ellison*, 2 Y. & Coll. Exch. 528.

(h) 2 Y. & Coll. Exch. 268. See *Hayler v. Tucker*, 4 Kay & J. 248, per Wood, V.-C.

(i) See *Thompson v. Thompson*, 1 Coll. 381; *Robinson v. Addison*, 2 Beav. 515.

(j) See sect. 29 as to transfer of shares by personal representatives.

The other Acts creating new stocks contain, almost all of them, provisions nearly similar; and these provisions have created a doubt, whether it was not the intention of the Legislature that stock should, by the Will, pass to the devisee, without the assent of the executor, and without, in the first instance, vesting in him, and being assets in his hands (*k*). But a series of modern decisions have established that stock, having been made personal property by the statutes, is, like all other personal property, assets in the hands of the executor: and consequently, that although specifically devised, it must, in the first instance, devolve upon the executor: and, till he assents, the legatee has no right to the legacy (*l*). And now by the National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 23, it is expressly enacted that, "The interest of a stockholder dying (before or after the passing of this Act) in stock shall be transferable by his executors or administrators notwithstanding any specific bequest thereof. The Bank of England or of Ireland shall not be required to allow any executors or administrators to transfer any stock until the probate of the Will or the letters of administration to the deceased has or have been left with the Bank for registration, and may require all the executors who have proved the Will to join in the transfer."

By the death of a master, his servant is discharged: and therefore the executors or administrators of the former can bring no action to enforce the contract of service after his death (*m*). Nor has the executor or administrator, generally speaking, any interest in an apprentice bound to the deceased. In the case of *Baxter v. Burfield* (*n*), Lee, C. J., held that an executrix could not maintain the action for debt upon bond for performance of indentures of apprenticeship on the grounds, (1) that the covenant was only to serve the master, and there was no mention of executors or administrators; (2) that the covenant was a personal covenant, and that the interest of the master in his apprenticeship is an interest coupled with a

Servants.

Apprentices.

(*k*) *Pearson v. Bank of England*, 2 Bro. C. C. 529; *Bank of England v. Lunn*, 15 Ves. 572, 578.

(*l*) *Bank of England v. Moffat*, 3 Bro. C. C. 260; *Bank of England v. Parsons*, 5 Ves. 665; *Bank of England v. Lunn*, 15 Ves. 569; *Franklin v. Bank of England*, 1 Russ. Chanc. Ca. 575; 9 B. & C. 156. See also *Churchill v. Bank of England*, 11 M. & W. 323.

(*m*) Wentw. Off. Ex. 141, 14th edit.

(*n*) 1 Bott. P. L. pl. 696, 6th edit.

personal trust which cannot be assigned, and which determines by his death like the case of a guardian; and, lastly, that the covenant to instruct is personal and cannot extend to executors who may not be capable of instructing. The interest the master has in his apprentice is a right to his service only. So in *Rex v. Peck* (*p*), Eyre, J., said, "an apprentice is a personal trust between the master and servant, and determines by the death of either of them: and by the death of either of them the end and design of the apprenticeship cannot be attained, and it may be the executor is of another trade."

But in the case of *Cooper v. Simmons* (*q*), where, by indenture, an infant, with the consent of his father, bound himself apprentice to a tradesman, *his executors and administrators*, such executors or administrators *carrying on the same trade or business*, and in the town of W., and with him, *and them* to serve for the term of seven years, and the master, in consideration of the service of the apprentice, covenanted to teach and instruct him or cause him to be taught and instructed during the term: it was held, that on the death of the master, the apprentice was bound to serve his widow, who was his executrix, whilst she carried on the same business in the town of W., and that she was bound to teach the apprentice.

Parish
apprentices:
32 Geo. III.
c. 57:

And with respect to parish apprentices, by stat. 32 Geo. III. c. 57, s. 1, after reciting that on the death of the master of any parish apprentice during the term of apprenticeship, the agreement for service on the part of the apprentice is at an end, but the covenant for maintenance on the part of the master still continues in force as far as his assets will extend, or doubts have arisen with respect thereto; it is enacted, that in case of the death of the master during the term of such apprenticeship, upon which binding no larger sum than 5*l.* shall be paid, any covenant for the maintenance of such apprentice, inserted in the indenture, shall not be in force longer than three calendar months next after the death of such master, &c., and that during such three months such apprentice shall continue to live with and serve as an apprentice the executor, &c., of such master. &c., or his appointee. Sects. 2, 3: Within such three calendar months after the death of such master or mistress, two justices, on the application of the widow, &c., may order that such apprentice shall serve the applicant during the residue of the

apprentice
where pre-
mium does
not exceed 5*l.*
shall serve the
executors of
his master or
their ap-
pointee for
three months:
or for the
remainder of
the term of
apprentice-
ship, on
application
to two
justices.

term; and after such order shall be made, the executors, &c., and the personal estate of the master, &c., shall be discharged from any covenant in such indenture.

In *Whincup v. Hughes* (*r*) the plaintiff apprenticed his son to a watchmaker and jeweller for the term of six years, paying to the master a premium of 25*l*. The master duly instructed the apprentice for a year, and then died. The plaintiff sought, in an action against the master's executrix for money had and received, to recover the whole or some part of the premium, on the ground of failure of consideration, but it was held that such failure being only partial, the action was not maintainable. So too in *Ferns v. Carr* (*s*), a solicitor who had received a premium on taking an artieled clerk died during the term of the articles, and it was held that his estate was not liable for the return of any part of the premium. Again, in *Re Thompson* (*t*), where the artieled clerk had died within a month after a premium of two hundred guineas had been paid, an application for repayment was made to the Court in the exercise of its summary jurisdiction, but the Court declined to order the return of any part of the premium.

Copyright is personal property and passes on the death of the owner to his personal representatives. Where the author of a work is the first owner of the copyright no assignment, otherwise than by Will, shall vest any rights in the copyright beyond twenty-five years from the death of the author, and the reversionary interest expectant on the termination of that period will on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives, but this does not apply to a collective work (*u*). Copyright:

An interest may also vest in him by virtue of a patent granted to the testator, for the invention of a new manufacture within the realm (*x*). And by the Patents and Designs Act, 1907, s. 43, if a person possessed of an invention dies without making application for a patent for the invention, application may be made by, and a patent for the invention granted to, his legal Patent:

(*r*) L. R. 6 C. P. 78.

(*s*) 28 C. D. 409. The Court, however, has power in the exercise of its inherent jurisdiction over its own officers to order a surviving partner to return part of the premium paid by a pupil of the deceased partner, and has exercised this jurisdiction in proper cases. See Cordery's Law of Solicitors, 3rd edit. p. 18.

(*t*) 1 Ex. 864.

(*u*) Copyright Act, 1911 (1 & 2 Geo. V. c. 46), s. 5 (2).

(*x*) Toller, 152.

representative. Every such application must contain a declaration by the legal representative that he believes such person to be the true and first inventor of the invention.

Carroome :

It seems to have been questioned whether a carroome, or a licence by the Mayor of London to keep a cart, is a chattel interest, and belongs to the executor, or whether it goes to the heir (z).

Rent :

When a man *seised in fee* makes a gift in tail, or lease for life or for years, reserving rent, the whole rent which becomes due after his death shall go with the reversion (as an incident thereof) to his heir, and not to his executor: for since, during the continuance of the particular estate, the reversioner loses the profits of the land, the rent ought to be paid to him as a compensation for the loss (a). And though the rent should be expressly reserved to the lessor, his *executors* and assigns, without naming the heir, the executors cannot have it, being strangers to the reversion, which is an inheritance (b). On the other hand, if a *lessee for years* makes an underlease, reserving rent, the rent accruing after his death shall go to his executor or administrator, and not to his heir, even though the reservation were to him and his heirs, during the term, without mentioning the executors (c). In these cases, if the personal representative sues the under-lessee for rent due since the death of the testator or intestate, it must be alleged that he had a chattel interest; otherwise it shall be intended that he was seised in fee, and then the rents belong to the heir, and not to the executor or

(z) Com. Dig. Biens (B.); *Hunt v. Hunt*, 2 Vern. 83.

(a) Co. Lit. 47, a; *Cothor v. Merrick*, Hardr. 95; 3 Bac. Abr. 62, Executors (H. 3). The law is the same where the lease is of a house, and certain household implements therein: *Anon.*, Dyer, 362, a; Godolph. Pt. 2, c. 24, s. 13, p. 191. So if a person *covenants*, grants, and agrees that another shall have and enjoy Blackacre for a certain time, and the other *covenants* to pay, in consideration thereof, to the testator, his heirs, executors, and assigns, a sum annually, the executor cannot sue on this covenant, for a breach after the death of the testator: *Drake v. Munday*, Cro. Car. 207. But see *Lord Hatherton v. Bradburne*, 13 Sim. 599.

(b) Co. Lit. 47, a. Whether the heir shall have it, though not mentioned, or it shall altogether determine by the lessor's death, the cases are discordant: See notes (2) and (3) to *Sacheverell v. Froggatt*, 2 Saund. 367, b, where all the authorities are collected. See also *Dollen v. Batt*, 4 C. B. N. S. 760; Foa, Landlord and Tenant, 3rd edit. p. 108. But if the rent be reserved *during the term* to the lessor, his executors, administrators, and assigns, the heir or devisee shall have it: 2 Saund. 367, b.

(c) 2 Saund. 371, note (7), to *Sacheverell v. Froggatt*.

administrator (*d*). If rent be reserved generally (without saying to whom) it will follow the reversion (*e*).

Again, if a man being seised in fee of one acre of land, and possessed of another acre for a term of years, makes a lease rendering one entire rent, and dies; whereby the reversion of one acre goes to his heir, and of the other to his executors: the rent accruing after shall be apportioned between his heir and his executors (*f*).

The Conveyancing Act, 1881, s. 10, provides as follows:—

“(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee’s part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to, and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of the reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased.

“(2.) This section applies only to leases made after the commencement of this Act.”

This section is now extended by the Conveyancing Act, 1911, to a case where the person entitled becomes so entitled after the condition of re-entry on forfeiture has become enforceable (*g*).

Where no reversion is left in the lessor, and the rent is reserved to his executors, administrators, and assigns, it will go to them and not to the heir (*h*).

If a lessee for a term of years underleases for a term

(*d*) *Norris v. Elsworth*, 1 Freem. 463. This statement is now subject to the provisions of the Land Transfer Act, 1897, see *ante*, p. 623.

(*e*) *Whitlock’s Case*, 8 Co. 69, *b*.

(*f*) *Gilb. Rents*, 188; *Moodie v. Garnance*, 3 Bulstr. 153, where the Court is said to have clearly agreed upon the apportionment, that by act of law this may well be. It was agreed in *Dumpor’s Case*, that if a man seised of two acres, the one in fee and the other in Borough-English, has issue two sons, and leases both acres for life or years, rendering rent with condition, and the lessor dies; in this case, by this descent, which is act of law, the reversion, rent, and condition are divided: 4 Co. 120, *b*; Co. Lit. 215, *a*.

(*g*) 1 & 2 Geo. V. c. 37, s. 2.

(*h*) 3 Cruise’s Dig. 321, 3rd edit.; *Jennison v. Lexington*, 1 P. Wms. 555.

exceeding in length that for which he himself holds, and the under-lessee covenants to pay rent to such lessee, his executor may sue the under-lessee for rent accruing during the continuance of the lessee's term (*k*).

If the rent be reserved for years, and be severed from the reversion, it may then go to the executor or administrator, although the reversion goes to the heir: Thus if a man, seised of land in fee, makes a lease for years, reserving rent, and afterwards devises the rent to a stranger and dies, and the stranger is seised of the rent and dies, his executors shall have this rent and not his heirs (*l*).

Arrears of
rent shall go
to the execu-
tor:

Again, though the whole rent, which accrues after the death of the lessor, shall, in the cases above mentioned, go with the reversion to the heir, yet the arrearages of rent, which became payable in the lifetime of the testator or intestate, shall, in all cases, go to his executor or administrator as part of his personal estate (*m*).

The executors or administrators of tenant for life of a rent-charge, and of tenant *pur autre vie*, after the death of *cestui que vie*, might bring debt to recover the arrears of such rent by the common law, although they could not formerly distrain for them (*n*): but before the statute 32 Hen. VIII. c. 37, the executor or administrators of a man seised of a rent-service, rent-charge, rent seek, or fee farm, in fee-simple or fee-tail, had no remedy for the arrears incurred in the lifetime of the testator or intestate (*o*). By that statute a double remedy is provided for them, viz., either to distrain or have an action of debt (*p*). The statute also gives, in terms, the same double

(*k*) *Baker v. Gostling*, 1 Bingham N. S. 19.

(*l*) *Knolle's Case*, Dyer, 5, *b*.

(*m*) 3 Bacon's Abr. 63, Executors (H. 3); Wentworth's Off. Ex. 129, 14th edit.; Godolphin. Pt. 2, c. 13, s. 3.

(*n*) Co. Lit. 162, *b*, and Hargrave's note; 1 Saunders, 281, n. (1). It is said in Bacon's Abr. tit. Executors (N.), tit. Debt (C.), that at common law an executor had no remedy for recovering of rent in arrear in the lifetime of the testator; but this appears a mistake; for, before the statute of Hen. VIII., if the lease was for years or the life of the testator, it would seem that the executor might have brought debt, and was only remediless in the case of his testator being seised of a rent in fee simple or fee tail, or *pur autre vie* as long as the estate of freehold continued: see Gilbert on Rents, 98; 1 Saunders, 281, n. (1), to *Duppa v. Mayo*.

(*o*) Co. Lit. 162, *a*; 1 Saunders, 282, n. (1), to *Duppa v. Mayo*.

(*p*) Co. Lit. 162, *a*. See a more particular exposition of this statute, *post*, Pt. III. Bk. I. Ch. I.

remedy to the executors of tenant for term of life of rent-charges, &c.; from which, at first view, it might be inferred that the executors of tenant for life could not bring debt at common law. But these words have, by the best authorities, been considered to refer only to tenants *pur autre vie* so long as *cestui que vie* lives (q).

With relation, then, to the title of the executor or administrator, at common law, to the arrears of rent accrued in the lifetime of the deceased, it used to be important to ascertain the precise period at which rent might be said to be due, so as to go to the personal representative, because generally there was no apportionment in his favour as against the heir or remainderman.

Formerly important to ascertain when rent was due, so as to go to the executor or administrator.

Before the passing of any of the Apportionment Acts, the non-apportionment of rent often worked great hardship. Most of these hardships were gradually remedied by legislation, which provided not only for the apportionment, but also for remedies for the recovery of the apportioned parts by the parties entitled thereto; but these statutes omitted to deal with some cases, and questions were constantly arising as to what cases fell within the enactments. Now, however, the Apportionment Act, 1870 (33 & 34 Vict. c. 35), has been passed in such comprehensive terms that the cases as to the construction of the former Acts have ceased to be of any importance: and, therefore, that portion of former Editions of this Work relating to them has been omitted.

This statute, after reciting that whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have passed, and whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences, it is enacted:—

Apportionment Act, 1870 (33 & 34 Vict. c. 35).

Sect. 2. "From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments (r) in the

Rents, &c., to accrue from day to day,

(q) See Hargrave's notes to Co. Lit. 162, *a*, 162, *b*; 1 Saund. 282, note (1) to *Duppa v. Mayo*. See sect. 4 of this statute, *post*, Pt. III. Bk. I. Ch. I.

(r) The "other periodical payments" must be payments recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation, and must be in the nature of income, *i.e.*, coming in from some kind of investment. There must be a change in ownership: a

and to be apportionable in respect of time.

nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly" (s).

change in investments is not sufficient to bring it within the Apportionment Act: *Re Clarke*, 18 C. D. 160.

The income of a share in a private iron company regulated by a deed of partnership under which the accounts were made up yearly, the profits for the previous year ascertained and the dividend to be paid decided by the managing partner, is not a dividend or a periodical payment within the meaning of this section: *Jones v. Ogle*, L. R. 8 Ch. 192.

Nor are the "net profits of a newspaper" (the mode and time of ascertaining and dividing which are wholly in the discretion of trustees): *Re Cox's Trusts*, 9 C. D. 159. But payments by way of bonus or surplus profits to the shareholders of a public company (even though such payments may be only occasional and the period of payment may be varied by resolution) are "dividends" within this section: *Re Griffith*, 12 C. D. 655. See sect. 5, *post*, p. 635. But not all payments by way of bonus are income of a testator's estate. The general principle applicable is thus stated in *Bouch v. Sproule* (29 C. D. 635, 653; 12 App. Cas. 385, 397): "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital." See *per Stirling, J.*, in *Re Malam*, [1894] 3 Ch. 578, 585; and see *Re Evans*, [1913] 1 Ch. 23; *Re Thomas*, [1916] 2 Ch. 331; *Re Ogilvie*, 88 L. J. Ch. 159.

The income arising from personalty specifically bequeathed was held not apportionable under this Act as between the specific legatee and the estate of the testator: *Whitehead v. Whitehead*, L. R. 16 Eq. 528. *Secus*, however, where stock is bequeathed in trust to pay the dividends to A. for life, and afterwards to fall into residue: *Pollock v. Pollock*, L. R. 18 Eq. 329.

This Act applies to a specific as well as to a residuary devise: *Hasluck v. Pedley*, L. R. 19 Eq. 271.

(s) Where stock in a public company was settled upon trust for A. for life, and after her death amongst certain beneficiaries, and after the death of A. the stock was sold "cum-dividend" under the order of Court; it was held that A.'s estate was not entitled under this Act to any payment out of the purchase-money of the stock in respect of a dividend declared and received by the purchaser after sale but part of which was earned prior to A.'s death: *Bulkeley v. Stephens*, [1896] 2 Ch. 241. Where at the date of the purchase of stock dividends have been earned and declared but not paid, the tenant for life is not entitled to such dividends, but they are to be treated as capital: *Re Peel's Settled Estates*, [1910] 1 Ch. 389. But dividends declared after the death of a tenant for life in respect of a period wholly prior to his death belong to his estate: *Re Muirhead*, [1916] 2 Ch. 181.

The Act does not apply to rent payable in advance: *Ellis v. Rowbotham*, [1900] 1 Q. B. 740.

Sect. 3. "The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before."

Apportioned part of rent, &c. to be payable when the next entire portion shall have become due.

Sect. 4. "All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity."

Persons shall have the same remedies for recovering apportioned parts as for entire portions.

Proviso as to rents reserved in certain cases.

Sect. 5. "In the construction of this Act—

"The word 'rents' includes rent service, rent-charge, and rent seek, and also tithes and all other periodical payments or renderings in lieu of or in the nature of rent or tithe."

"The word 'annuities' includes salaries and pensions."

"The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies (*t*), divisible between all or any of the members of such

Interpretation of terms.

(*t*) This will include any public company, but not a private partnership: *Re Griffith*, 12 C. D. 655; *Jones v. Ogle*, L. R. 14 Eq. 419; 8 Ch. 192; *Re Lysaght*, [1898] 1 Ch. 115; *Re White*, [1913] 1 Ch. 231.

A life assurance society, unincorporated, but established by a deed

respective companies, whether such payments shall usually be made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purpose of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'dividend' does not include payments in the nature of a return or reimbursement of capital" (u).

Sect. 6. "Nothing in this Act contained shall render apporportionable any annual sums made payable in policies of assurance of any description."

Sect. 7. "The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apporportionment shall take place" (x).

If the lord of a manor admit a copyholder, whereupon a fine is set, and the lord die before the fine be paid, it will belong to his executors, who may bring an *assumpsit* or debt for it (y): for it is a fruit fallen, and shall not go with the inheritance. So also of reliefs and heriots (z).

A copyhold estate entailed, consisting principally of a house, having been burnt down, a sum of money was collected on briefs, towards the rebuilding, and paid by the trustees of the charity, into the hands of the guardian of tenant in tail, who was an infant, and died under age, without its having been so applied: a question arose between the personal representatives of the infant, and those entitled to the estate under the settlement: and it was held that the money should go to the latter; but that allowance should be made to the former for the amount of the interest of the money, from the time it was paid to the guardian to the death of the infant (a). It appears, however,

of settlement, with a board of directors, capital, and a list of shareholders, and possessing certain powers and concessions under a special Act of Parliament, is a "public company" within the meaning of this section: *Re Griffith*, 12 C. D. 655.

(u) *Ante*, p. 633, n. (r).

(x) The stipulation must, it seems, be contained in a Will or other instrument of gift: *Re Oppenheimer*, [1907] 1 Ch. 399. This section does not apply where the whole income is directed to be applied as income: *Re Edwards*, [1918] 1 Ch. 142. As to whether the effect of this Act is retrospective, see *Constable v. Constable*, 11 C. D. 681; *Re Cline's Estate*, L. R. 18 Eq. 213, 214: followed and approved by *Pearson, J.*, in *Lawrence v. Lawrence*, 26 C. D. 795.

(y) *Shuttleworth v. Garnet*, 3 Lev. 261, 262.

(z) *Andrew Ognel's Case*, 4 Co. 49, b; Co. Lit. 47, b, 83, a, b, 162, b; 1 Watk. Cop. 322, note (f).

(a) *Rook v. Warth*, 1 Ves. Sen. 460.

Act not to
apply to
policies of
assurance:

nor where
stipulation
made to the
contrary.

Copyhold
fines, &c.

Reliefs.

Heriots.

Money col-
lected on
briefs for
charity:

that where a tenant for life effects an insurance against fire, moneys received under the insurance belong to him and do not go with the land (*b*).

In *Noble v. Cass* (*c*), a testatrix made a devise to trustees and their heirs upon trust for her daughter during her life; and after her decease on trust for her niece, for life; and after the decease of her niece she devised the premises to the children of the niece in fee: The testatrix had granted a lease of the premises devised for a term still subsisting: After the death of the daughter, and during the lifetime of the niece, the trustees brought an action against the lessee for a breach of the covenants of the lease, by reason of dilapidations, and recovered 500*l.* damages: Afterwards the niece died: and it was held by Sir L. Shadwell, V.-C., that the sum so recovered belonged to her administrator. The spirit of the law is that with respect to injuries to land for which damages are to be recovered by personal action, the person who brings the action is entitled to the damages. So where a tenant for life recovers damages there is no equity to compel him to hand them over to the trustees (*cc*). But damages recovered by the trustees must be treated as *corpus* unless the tenant for life can make out a right to the money (*d*).

damages recovered by trustees during a tenancy for life belong to the executor of the tenant, and not to the inheritance.

In the case of a corporation sole, as a bishop, parson, vicar, master of an hospital, &c., no *chose in action* can go in succession; for the successors shall no more have them than the heirs of a private man; since succession in a body politic is inheritance in case of a body private (*e*). Therefore a bond given to the Ordinary by an administrator under sect. 1 of the Statute of Distributions (22 & 23 Car. II. c. 10) passed, on his death, to his executor and not to his successor (*f*). But by custom a *chose in action* may go in succession to a corporation sole; as in London, where the Chamberlain is a special corporation for taking bonds for the benefit of the Orphanage Fund, which has been frequently adjudged a good custom (*g*): But he cannot

Corporation sole:
chose in action goes to his executors, and not his successors:

unless by custom:

(*b*) *Norris v. Harrison*, 2 Madd. 268; *Noble v. Cass*, 2 Sim. 343.

(*c*) 2 Sim. 343.

(*cc*) *Re Lacon's Settlement*, [1911] 2 Ch. 17; *Re Dealtry*, 108 L. T. 832.

(*d*) *Re Pyke*, [1912] 1 Ch. 770.

(*e*) *Fulwood's Case*, 4 Co., 65, *a*.

(*f*) *Howley v. Knight*, 14 Q. B. 240.

(*g*) *Byrd v. Wylford*, Cro. Eliz. 464, 682; *Fulwood's Case*, 4 Co. 65, *a*.

take a bond to himself or his successors for any other purpose (h). By the charter granted to the College of Physicians, and confirmed in Parliament, the offenders in practising physic in London without admission by the College of Physicians shall forfeit 5*l.* for every month, *unum dimidium regi et alterum dimidium dicto presidenti et collegio*; on this charter it was holden that if the President of the College recovers in debt against an offender and dies, the successor shall have a *scire facias* to execute it, and not the executor; for the predecessor recovered it as due to him and the College (i). So a chose in action may go to successors by statute as in the case of the Treasury Solicitor and the Public Trustee.

Interest in joint choses in action does not pass to executors.

There has already been occasion to observe, that survivorship holds place, as well between joint-tenants of chattel property in possession or in action, as between joint-tenants of inheritance or freehold (j). Hence the general rule is, that the interest which the testator had in a chose in action jointly with another, shall not pass to his executor (k): yet *per legem mercatoriam*, as formerly mentioned, an exception was established in favour of merchants, which has been extended to all traders, and persons engaged in joint undertakings in the nature of trade (l). But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased (m). This question will be more fully investigated hereafter, together with the subject of remedies by executors and administrators generally (n).

Choses in action vested at law in the executor, though assigned by the deceased. Now by the Judicature Act choses in

In conclusion, it may be observed, that according to the old law, although the deceased had, in his lifetime, assigned all his interest in his choses in action, still upon his death they would vest, at law, in his executor or administrator; because at law choses in action were not assignable. But now, by the Judicature Act, 1873, s. 25, sub-s. 6, it is enacted that "Any absolute

(h) 2 Black. Comm. 432.

(i) *Atkins v. Gardner*, Cro. Jac. 159.

(j) *Ante*, p. 495.

(k) See *Southcote v. Hoare*, 3 Taunt. 87.

(l) *Ante*, p. 495.

(m) *Martin v. Crompe*, 1 Lord Raym. 340; and see *ante*, p. 495, n. (j).

(n) *Post*, Pt. v. Bk. I. Ch. I.

assignment by writing under the hand of the assignor (not *action* assignable. purporting to be by way of charge only) of any debt or other legal *chose in action* (*o*) of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.”

The executor of a bankrupt is not entitled to his *choses in action*, for they are vested in the trustee in the bankruptcy, for, where any part of the property of a bankrupt consists of *things in action*, such things shall be deemed to have been duly assigned to the trustee (*p*).

Executor of bankrupt.

In cases of wreck, by the now repealed stat. Westm. I. (3 Edw. I. c. 4), if any one proved property in the wrecked goods within a year and a day, they should be restored to him without delay. The year and a day, within which the owner might prove his property, were to be computed from the seizure, as *wreck*: And if the owner died within that time, his executor or administrator might prove his property (*q*). The subject of “wreck” (which term for purposes of the Act includes flotsam, jetsam and lagan) is now dealt with by the Merchant Shipping Act, 1894.

Wrecked goods.

An instance occurs of a claim, founded on contract, which might have been enforced by the deceased, while alive, and yet is not transmitted to the executor or administrator in the case of arrears of pin-money, to which the wife herself may be, to some extent, entitled, but which, as there has been already occasion to show (*r*), cannot be recovered, to any extent whatever, by her personal representatives. Again, it does not appear to be satis-

Instances of rights not transmissible to executors: arrears of pin-money:

(*o*) A right to sue for damage done in exercise of statutory powers is a legal *chose in action* within the meaning of this section: *Dawson v. Great Northern and City Rail. Co.*, [1905] 1 K. B. 260.

(*p*) Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 43 (5).

(*q*) 2 Inst. 168; Com. Dig. Wreck (A). This statute was repealed by the S. L. R. Act, 1863.

(*r*) *Ante*, p. 587.

arrears of
alimony.

factorily settled that the Court will allow the personal representatives of a wife to enforce payment of the arrears of alimony against the husband; and it has been held that they cannot sustain a bill in equity for that purpose (s).

SECTION III.

The Right of an Executor or Administrator to Choses in Action, as it respects Husband and Wife.

In considering the right of an executor or administrator to *choses in action*, as it concerns the relation of husband and wife, it may be proper, although the subject has become of less importance than formerly by reason of the Married Women's Property Act, 1882, to pursue the course employed in a previous part of this Treatise, with respect to chattels real; and to investigate: 1. The right of the executor or administrator of the husband to the *choses in action* of the wife, when the wife survives: 2. The rights of the administrator of the wife, when the husband survives.

General effect
of M. W. P.
Act, 1882
(45 & 46 Vict.
c. 75).

The result of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), is that with regard to such property as by sects. 2 and 5 is made the separate property of the wife, the husband will not be able, if he survives her, to claim such property *jure mariti*, but only as administrator of his wife, and this equally, whether the property consists of chattels in possession, or *choses in action*: but inasmuch as, if a woman married before the commencement of the Act has before that date acquired a title, whether vested or contingent and whether in reversion or remainder, to any property, such property is not made her separate estate by sect. 5 of the Act, it is thought convenient to reprint the substance of the text as it existed in former editions.

Law prior to
Married
Women's
Property Act,
1882.

Law as to Choses in Action of the Wife not affected by the Married Women's Property Act, 1882.

1. When the wife survives.

When the
wife survives.

Property falling under the description of *choses in action* of the wife are debts owing to her on bond or otherwise, arrears

(s) *Stones v. Cooke*, 8 Sim. 321, note (q), where Lord Lyndhurst reversed the decision of the V.-C., 7 Sim. 22; *De Blaquiére v. De Blaquiére*, 3 Hagg. 322; *Vandergucht v. De Blaquiére*, 5 M. & Cr. 229, 241.

of rent, legacies, trust funds, residuary personal estate, money in the funds, and other property recoverable by action or suit.

Marriage is only a qualified gift to the husband of the wife's *choses in action*: viz., upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife, without having reduced such property into possession, she, and not his executors or administrators, will be entitled to it (x).

General rule,² that her *choses in action* not reduced into possession shall survive to her:

Accordingly, the general rule of law is, that *choses in action*, which are given to the wife, *either before or after marriage*, survive to her after the death of her husband, provided he has not reduced them into possession: but with this distinction, that as to those which come during the coverture, the husband may, for them, bring an action in his own name; may disagree to the interest of the wife; and that recovering in his own name is equal to reducing them into possession (y).

Thus, in *Lawrence v. Beverleigh* (z), a bond to the wife *dum sola* was by the marriage articles to be paid to the husband after twelve months, and he to purchase lands with it, and settle it on himself and his wife, and the heirs of their two bodies, remainder to the heirs of the husband: They had issue a daughter: the husband died, and the daughter died: The bond unaltered, being a *chose in action*, survived to the wife, and was not liable at law to bond creditors, nor was the interest due thereon.

Instances:
Bond to the wife *dum sola*:

So if an obligation be made during coverture to husband and wife, and the husband dies, the wife shall have it by survivorship, and not the executors of the husband (a).

bond to husband and wife during coverture:

Again, if a bond is given to the wife alone during coverture, the bond, on the death of the husband, will survive to the wife, and his executors shall not have it (b).

bond to wife alone during coverture:

(x) Co. Lit. 351, a; 1 Roper, 204; *Osborn v. Morgan*, 9 Hare, 432, 433. The rule applies to the arrears of the wife's income, they being choses in action: *Wilkinson v. Charlesworth*, 10 Beav. 324.

(y) *Garforth v. Bradley*, 2 Ves. Sen. 673, 677; *Richards v. Richards*, 2 B. & Adol. 452. The law, however, concerning a married woman's property was somewhat modified by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).

(z) 2 Keb. 841, cited in *Baden v. Lord Pembroke*, 2 Vern. 55.

(a) 1 Roll. Abr. 349, tit. Baron and Feme (B.), pl. 1; *Norton v. Glover*, Noy, 149; *Coppin v. —*, 2 P. Wms. 497; Com. Dig. Baron and Feme (F. 1). So if one is bound to baron and feme in a statute merchant, and the baron dies, the statute shall survive to the feme, and she shall have execution, and not the executor of the baron: Bro. Baron and Feme, pl. 24. So the feme shall have a recognizance by survivorship: 1 Roll. Abr. 349, pl. 2.

(b) *Day v. Pargrave*, cited by Dampier, J., in *Philliskirk v. Pluck-*

choses in action, generally, given to wife during coverture :

And it may be stated, generally, that a married woman, though formerly incapable of making a contract, was capable of having a *chose in action* conferred on her, which would survive to her on the death of her husband, unless he should have interfered by doing some act to reduce it into possession (*c*).

Having regard to sect. 1 (2) of the Married Women's Property Act, 1882, which rendered a married woman capable of entering into and rendering herself liable in contract and of suing and being sued either in contract, or in tort, or otherwise, as if she were a *feme sole*, it seems sufficient now to refer the reader to the former Editions of this Work as to the respective rights, prior to 1st January, 1883, of husband and wife to bills or notes given to a woman *dum sola* or during coverture.

Stock.

The rule above stated, as to the wife's title to her *choses in action* by survivorship, may be further exemplified by the instance of stock (*d*).

Thus, if a husband purchases stock in the funds, in the joint names of himself and his wife, and dies, his wife is *primâ facie* entitled to it by survivorship, to the exclusion of her husband's executors (*f*).

Arrears of rent.

Another strong illustration of the general principle is to be found in the wife's right, in certain cases, to arrears of rent accrued in the lifetime of her husband, in preference to her husband's executors. Thus if the husband die before the wife, and rent is in arrear, which was reserved to them jointly on an underlease of the wife's leasehold estate, she will not only, as it has before appeared (*g*), be entitled to the accruing rent, but also to the arrears; because they, remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal, the term, survive to the wife (*h*). But if she were not a party to the derivative lease, or if she were a party, and the rent was reserved to the husband alone, then, as well the arrears as the future rent will belong to the executors or administrators of the husband (*i*). So if a lease be made by the husband and wife, of her freehold estate, not

well, 2 M. & S. 396, 397; 1 Roll. Abr. 345, tit. Baron and Feme (H.), pl. 7; *Checkley v. Checkley*, 2 Show. 247.

(*c*) *Dalton v. Midland Counties Rail. Co.*, 13 C. B. 474, 478.

(*d*) *Scawen v. Blunt*, 7 Ves. 294.

(*f*) *Ante*, p. 583. See also *Shuttleworth v. Greaves*, 4 M. & Cr. 35, and *Low v. Carter*, 1 Beav. 426.

(*g*) See *ante*, p. 534, note (*q*).

(*h*) 1 Roper, *Husb. & Wife*, 175, 2nd edit.

(*i*) *Ante*, p. 533; 1 Roper, *Husb. & Wife*, 174, 2nd edit.

conformable to the statute 32 Hen. VIII. c. 28, and after his death she elects to confirm it, she is, it seems, entitled to the arrears of rent (*k*). Likewise, if a woman leases her land, (for life or years,) reserving rent, and afterwards takes husband: after the death of the husband, the wife shall have the arrearage of rent incurred during the coverture, and not the executors of the husband (*l*).

So if a husband be seised of a rent-service, rent-charge, or rent-seck, in the right of his wife, and the rent be in arrear during the coverture, and then the husband dies, the wife shall have the arrearage, and not the executors of the husband (*m*); because the principals which survived to her carried also all that was due in respect of them (*n*). So if baron and feme are seised of a rent-service for their lives, rent incurs, and afterwards the baron dies, the feme shall have the arrearage during the coverture (*o*).

In these cases it should be observed, that if the rent had been received during the coverture, it would have become the absolute property of the husband: Therefore, where a feme leased for life, reserving rent, and took husband, and during the coverture a receiver received the rent of the lessee, (it does not appear by whom he was made receiver, but it seems to be intended that he received it for the baron and feme,) and after the baron died: it was held, that the executors of the baron should have the writ of account against the receiver and not the feme; for this was a chattel and duty in the baron by the receipt (*p*).

Where the husband was seised or possessed of tithes in the right of the wife, or jointly with his wife, and the husband died, it was held that the wife, and not the executors of the husband, should have an action for the subtraction of such tithes (*q*); but that if the tithes were once set out, and severed from the nine parts, then they became a chattel vested in the husband (*r*).

(*k*) 1 Roll. Abr. 350, tit. Baron and Feme (D.), pl. 4.

(*l*) *Ibid.*, pl. 2, pl. 5.

(*m*) Co. Lit. 351, *b*; 1 Roll. Abr. 350; Baron & Feme (D.), pl. 1.

(*n*) *Temple v. Temple*, Cro. Eliz. 791; *Salwey v. Salwey*, Ambl. 692; *Carew v. Burgoyne*, 1 Roll. Abr. 359; Baron & Feme (D.), pl. 8.

(*o*) 1 Roll. Abr. 350; Baron & Feme (D.), pl. 3; *Temple v. Temple*, Cro. Eliz. 791; *Dembyn v. Brown*, Moor. 887.

(*p*) 1 Roll. Abr. 350, tit. Baron & Feme (D.), pl. 6.

(*q*) *Foord v. Pomroy*, Noy, 136.

(*r*) *Anon.*, Ley. 70.

Estray.

If any estray comes into the manor of the wife, and the husband dies before seizure, the wife shall have it; for that the property was not in her before seizure (s).

Orphan's
portion in
Chamber.

The portion of an orphan of the Chamber of London, if the husband dies without altering the property, shall go to the feme (t).

Husband
and wife lost
in the same
ship.

In *Hitchcock v. Beardsley* (u), a father, upon the marriage of his daughter, gave a bill of exchange for 1,200*l.* as a marriage portion, and the husband agreed to settle it upon the wife, within three or four years after the marriage: The husband and wife, within three years after their marriage, embarked in the same vessel for Corunna, and the vessel, with all the crew and passengers, was lost on the voyage: The question was whether the representative of the husband or of the wife was entitled to receive the 1,200*l.*: Lord Hardwicke, though it became unnecessary to decide the point, inclined to be of opinion, that the husband having by the bill of exchange the legal right to the money, and not being obliged to settle it on his wife within three or four years, and she dying within that time, the representatives of the husband had the stronger right, and the rather, because in order to make a trust arise for the wife, so as to give her representatives any right to take away the legal interest, it should be shown on their part that she survived (x).

What
amounts to
reduction of
the wife's
choses in
action into
possession by
the husband:

Examples having been thus brought forward of the rule that the wife's *choses in action* will not pass to her husband's executors, unless he reduced them into possession in his lifetime, it is now proposed to consider what will be such a reduction of them by the husband into possession, as will defeat the wife's right to them by survivorship.

It must be observed, that all questions between the wife and those who claim *by assignment* from the husband relate to the Law of Husband and Wife, and are foreign to the Law of Executors and Administrators. The cases, which properly belong to this Treatise, are confined to those, in which the question is between the wife and the personal representatives of her husband, where the latter claim to exclude her right, as

(s) Co. Lit. 351, b.

(t) *Pheasant v. Pheasant*, 1 Chanc. Cas. 181.

(u) *West's Case*, temp. Hard. 445.

(x) As to the law respecting the question of survivorship in a case of this description, see *post*, Pt. III. Bk. III. Ch. II. § v. (1).

survivor, by some act which is asserted to have reduced the *choses in action into the possession of the husband himself.*

In the first place it must be remarked, that a mere intention to reduce the wife's *choses in action* into possession will be insufficient to defeat her right to them by survivorship. The acts to effect that purpose must be such as to change the property in them, or, in other words, must be something to divest the wife's right, and to make that of the husband absolute, such as a judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied to his use (z).

Mere
intention
insufficient :

Accordingly in the case of *Scarpellini v. Atcheson* (a), where in an action of *assumpsit* on a promissory note by payee against maker, the defendant pleaded that, when the note was made, the plaintiff was the wife of B., and that, after the making, and while she was his wife, he elected to have and take the said note in his marital right, and then caused the plaintiff to endorse, and she, by his authority, did then endorse the note to B., and B. then delivered it so endorsed to F.; that afterwards, and after the note was due, and before action brought, B. died: and that afterwards and before action brought, the note came to the plaintiff's possession by delivery from F.; it was held, on special demurrer, that the plea was bad, because it did not clearly show such a reduction of the note into possession by the husband as disentitled the wife to sue upon it after his death.

So where a husband agreed that a legacy given to his wife should be set off against a sum of the same amount which he owed to the testator on his promissory note; and he and his wife signed a *receipt* for the legacy, but the executors did not deliver up the note to him; it was held, that she surviving him was entitled to be paid the legacy (b).

Again, a mere appropriation of the fund will be insufficient. Thus it was held, that a legacy to a married woman was not sufficiently reduced into possession, so as to prevent her right by survivorship upon her husband's death, by the appropriation by the executrix of a mortgage to the same amount (c).

mere
appropriation
of the fund
insufficient :

(z) 1 Roper, *Husb. & Wife*, 208, 2nd edit. See also *Aitchison v. Dixon*, L. R. 10 Eq. 589; *Scrutton v. Pattilo*, L. R. 19 Eq. 369.

(a) 7 Q. B. 864.

(b) *Harrison v. Andrews*, 13 Sim. 595.

(c) *Blount v. Bestland*, 5 Ves. 515.

receipt by the
husband:

It is clear, that if the husband receive the money, legacy, or duty which was owing to his wife, or if he alone, or he and his wife, authorise a person to receive it who actually obtains it, either of those receipts will change the wife's interest in the property, and be a reduction of the *chose in action* into the possession of her husband, divested of her title to it upon surviving him: and his executors may maintain an action for the money so received by the person so authorised (*d*).

Thus in *Dodswell v. Earle* (*e*), A. the wife of B. was entitled to 250*l.*, under the Will of C., expectant upon the death of D.: The executor of C., upon B.'s application, and with the wife's consent, paid the money to B., he undertaking to pay to D. the interest during her life: The wife, having survived D., who survived her husband, claimed by bill in equity the 250*l.* against her husband's executors; but the bill was dismissed.

Accordingly it has been held, that the husband may sufficiently reduce a mortgage debt due to the wife into possession by receiving the mortgage money, notwithstanding he dies before the mortgage estate has been re-conveyed; and in such case the surviving wife will be a trustee of the legal estate for the mortgagor (*g*). Again, if the husband releases an annuity secured to the wife by bond, this will bind her; for as he could release the bond, so he may the annuity (*h*).

what does not
amount to a
receipt by the
husband:

It may be useful in this place to adduce some authorities, as to what acts do not amount to a receipt by the husband or his appointee, so as to defeat the wife's title upon surviving him.

(*d*) 1 Roper, *Husb. & Wife*, 220, 2nd edit. Where money of a wife was, by the direction of her husband, who had the control of it, paid to the trustees of a post-nuptial settlement, which was not binding on the wife, it was held that her right by survivorship was destroyed, the property having by these means been reduced into possession: *Hamilton v. Mills*, 29 Beav. 193. This case does not conflict with *Pringle v. Pringle*, 22 Beav. 631, where the money was under the control of the Court of Chancery, which, without any direction or release or receipt from the husband, ordered the money to be paid to the trustee of a settlement approved of by the Court; and it was held that the money, though held by the trustees, to some extent, for the husband, could not be considered as reduced into possession beyond the interest given him by the settlement. Cf. also *Cogan v. Duffield*, 20 Eq. 789, and on appeal 2 C. D. 44, where a sum of consols belonging to the wife before marriage was transferred to trustees of a settlement, the husband joining in the transfer for the purpose, not of reducing it into possession, but of making it subject to the terms of the settlement; and it was held that the transfer of the fund to the trustees was not a reduction into possession by the husband.

(*e*) 12 Ves. 473.

(*g*) *Rees v. Keith*, 11 Sim. 388.

(*h*) *Hore v. Becher*, 12 Sim. 465.

A transfer of the wife's stock into the husband's own name will, it should seem, amount to such a receipt; because it is an act vesting the whole property in him (*i*): But a transfer of stock into the wife's name, to which she became entitled during coverture, shall not be considered as a payment or transfer to the husband, so as to defeat her right by survivorship (*k*).

In *Burnham v. Bennett* (*m*), by a post-nuptial settlement, reciting that a sum of stock originally standing in the name of the wife, had been transferred into the names of trustees, and that it had been agreed that a promissory note of 500*l.*, given to the wife by her brother, should be cancelled, and that he should give his bond to the trustees for the amount, it was witnessed, agreed and declared that the trustees should stand possessed of these funds, in trust to pay the interest and dividends to the husband for life; then to the wife for life; and, upon the death of the survivor, to transfer the funds to the children of the marriage, and, in case there should be no children, then to such persons as the wife should by deed or Will, during and notwithstanding her coverture, appoint, and in default of such appointment, to the husband, his executors, administrators, and assigns: There were no children of the marriage: The wife survived the husband: And it was held by Knight-Bruce, V.-C., that in the event of the death of the wife without making a valid appointment, the fund would belong to the husband's personal representative, as having been reduced into the husband's possession by the settlement: His Honour agreed, that in the case of a wife having a *chose in action*, whether legal or equitable, the mere circumstance of the legal title being changed does not, in general, affect her; but considered, in the present case, that the whole of the circumstances formed one entire transaction, as binding and effectual, as if the husband had received the money or stock himself: and the learned judge said, that he agreed with the substantial result of *Ryland v. Smith* (*n*) and *Wall v. Tomlinson* (*o*); for, as he understood them, the property had been made to change hands, with a view to an intended settlement; in each case the change was such, the circumstances were such,

(*i*) 1 Roper, Husb. & Wife, 221, 2nd edit.

(*k*) *Wildman v. Wildman*, 9 Ves. 174.

(*m*) 2 Coll. 254.

(*n*) 1 My. & Cr. 53.

(*o*) 16 Ves. 413.

that if the settlement were treated as effectual the wife was entitled; but if the settlement were not effectual, then there was no trust, and nothing but the legal title changed; and, therefore, in that view, the wife was entitled (*p*).

Where a *feme sole* was entitled to a sum of money charged on her brother's estate, (who, in a settlement made on the occasion of her marriage, covenanted to pay it to her husband, and the husband received the interest, but died without having got in the principal, it was held that the covenant was only an additional security, and did not change the nature of the debt, which still continued as a charge on the land, and therefore, that the principal vested in the wife by survivorship (*r*). In the case of *Nash v. Nash* (*s*), the receipt by the husband of part of the principal on the promissory note made to the wife, and of the interest upon the remainder, was held by Sir Thomas Plumer, V.-C., to be no reduction into possession of such remainder, so as to bar the wife's right by survivorship (*t*). So also where money was left in the hands of trustees for the benefit of the wife, and her husband died, she was declared to be entitled to it by survivorship, her husband having made no disposition of it during his life (*u*).

husband's
receipt as
trustee:

The husband's receipt or possession of his wife's *choses in action* must be in the character of husband in order to defeat his wife's title by survivorship. Thus, in a case (*x*) where a trustee and executor married one of the residuary legatees named in the Will, it was determined that his possession of the testator's personal estate was to be considered as that of trustee and executor, he having alone proved: so that his wife's share of the residue could not be regarded as sufficiently reduced into possession to prevent its surviving to her upon his death (*y*).

effect of
proceedings
in law and
equity on the
wife's *choses*
in action:

It remains to consider the effect of proceedings at law and in equity, and submissions to arbitration, as to vesting absolutely in the husband the wife's *choses in action*.

(*p*) See observations on this case of Bacon, V.-C., in *Cogan v. Duffield*, 20 Eq. at p. 801; and see *Hansen v. Miller*, 14 Sim. 22.

(*r*) *Howman v. Corie*, 2 Vern. 190. See, however, *post*, p. 650, as to the general rule with regard to the husband's rights in a chose in action under an ante-nuptial settlement.

(*s*) 2 Madd. 133.

(*t*) See also *Hart v. Stephens*, 6 Q. B. 937; accord.

(*u*) *Twisden v. Wise*, 1 Vern. 161.

(*x*) *Baker v. Hall*, 12 Ves. 497.

(*y*) See also *Wall v. Tomlinson*, 16 Ves. 413.

The naming or not naming the wife in an action is attended with material consequences in relation to the present subject; for if she be a party, and the husband die after judgment, and before execution sued out, the judgment will survive to her, and she will be entitled to proceed upon such judgment (*z*). But if the action be brought by the husband alone, and he die after judgment, his representatives, and not the wife, will be entitled to the benefit of it (*a*). Costs ordered by rule of Court to be paid to the husband and wife have been held to survive to the wife (*b*).

if the wife be joined in an action, the judgment may survive: *secus*, if the husband sue alone:

If the husband alone prove the wife's debt in the bankruptcy of the debtor, it seems that her right by survivorship is not defeated (*c*).

effect of proof under commission of bankrupt:

Decrees in equity so far resemble judgments at law in this respect, that until the money be ordered to be paid, or declared to belong to the husband, the wife's rights will remain undisturbed; and as a joint judgment will survive to the wife if her husband die before execution is awarded, so will a joint decree until an order be obtained for payment, or declaring the money to belong to the husband (*d*). An order for a payment of a sum of money to the husband, in right of his wife, changes the property, and vests it in him freed from his wife's right by survivorship (*e*).

decrees and orders in equity:

In another case the husband having assigned a fund in Court belonging to the wife, an order was made, on her examination and consent, that part of it should be paid to the assignee, and that the interest of the remainder should be paid to her for her life for her separate use, with liberty for any persons entitled to apply at her death: This was held not to affect her right of survivorship, as to the remainder of the fund; and on her death, she having survived her husband, a transfer to her administrator was directed (*f*).

(*z*) As to the cases in which the husband and wife *must* join, and those in which he may sue alone, or join with the wife, at his option, see Com. Dig. Baron and Feme (v.) (x.).

(*a*) *Russell's Case*, Noy, 70; *Garforth v. Bradley*, 2 Ves. Sen. 676, 677, in Lord Hardwicke's judgment; 1 Roper, *Husb. & Wife*, 212, 2nd edit.

(*b*) *Tilt v. Bartlett*, Hanmer, 104.

(*c*) See *Anon.*, 2 Vern. 707.

(*d*) *Murray v. Lord Elibank*, 10 Ves. 91; 1 Roper, *Husb. & Wife*, 216, 217, 2nd edit. See also *Bond v. Simmons*, 3 Atk. 20; *Macaulay v. Philips*, 4 Ves. 15; *Baldwin v. Baldwin*, 5 De G. & Sm. 319.

(*e*) *Heygate v. Annesley*, 3 Bro. C. C. 362.

(*f*) *Johnson v. Johnson*, 1 Jac. & Walk. 472; 1 Roper, *Husb. & Wife*, 218, 2nd edit. See also *Re Jenkins*, 5 Russ. 183.

Effect of arbitration on the wife's *choses in action*:

There has already been occasion to observe, that an award in favour of the husband in regard to the wife's leasehold interest will alter the property, and vest the term in him: and it has been so decided in regard to her other chattels^(h).

agreements *pendente lite*:

However, a Court of Equity will not permit agreements entered into between a married woman (or her friends acting for her) and her husband, *pendente lite*, to be obligatory upon her; so that any arrangement which, pending a suit, may be so made, by which it is agreed that he, upon certain terms, shall have the residue of her property, will not, without the sanction of the Court, bind her: Notwithstanding, therefore, such an agreement, if the title of the husband's representatives rest solely upon it, his wife's right by survivorship will take place ⁽ⁱ⁾.

When executors of husband are entitled to the wife's *choses in action* by reason of an ante-nuptial settlement.

The executors of the husband may be entitled to the exclusion of the widow to her *choses in action*, although not reduced by him into possession, by reason of an ante-nuptial settlement on the wife; for the husband may entitle himself to all his intended wife's personal estate, whether in possession or in action, or which she may afterwards acquire, by becoming a purchaser of it previously to and in contemplation of the marriage ^(k).

But a mere settlement will not entitle the husband or his executors to the whole of the wife's fortune. There must be an agreement for the purpose either expressed or implied: for if the stipulation be for a part only of her property, that necessarily excludes the residue; or if the agreement extend to the whole of the fortune she was *then* entitled to, her husband or his executors will not be entitled to any personal estate which may accrue to her during the marriage.

In *Druce v. Denison* ^(l), Lord Eldon regarded it as established, that the settlement, to be the purchase of the wife's fortune, must either express it to be for that consideration, or the contents of the settlement altogether must import that, and plainly import it as much as if it were expressed: that such was the result of the cases upon the subject, and that it was not worth while to consider in what respect the older cases were unsatisfactory, involving inquiries not very easy to execute.

^(h) 1 Roper, Husb. & Wife, 219, 2nd edit.; *Oglander v. Baston*, 1 Vern. 396.

⁽ⁱ⁾ 1 Roper, Husb. & Wife, 219, 2nd edit.; *Macaulay v. Philips*, 4 Ves. 15.

^(k) See, however, *ante*, p. 648.

^(l) 6 Ves. 395.

The other principal decisions on this subject will be found collected in the note below (*m*): And the deductions drawn from them by an able writer (*n*) are as follows:—1. That a settlement, made before marriage in consideration of the wife's fortune, without saying more, entitles the husband to all her then personal property, and not to such which afterwards accrues to her. 2. That if a part of her fortune only appear to be stipulated for, the residue she then has, or what may afterwards accrue to her, will not belong to the husband. 3. But when it appears from the settlement, that it was the agreement between the parties that he should not only have his wife's then present, but all her subsequently acquired personal estate, he will in such cases be entitled to the whole under the marriage contract. And 4. That in instances where any of the wife's *choses in action* are not purchased by the husband by settlement, they will be subject to her rights of survivorship, which have been before considered.

It has just been stated, that an actual agreement or contract is necessary to give to the husband's executors his wife's *choses in action*, in the event of her surviving him, in consideration of the provision made by him for her: and it seems a necessary consequence that a settlement made after the marriage by the husband upon his wife, even upon an accession of fortune to her (not given to her separate use and disposition) would not constitute the husband a purchaser of such additional fortune, but the wife's title by survivorship would prevail; because as a *feme covert* she was incapable of contract, and especially of contract with her husband (*o*). The sanction of the wife's father, guardian or trustee, could not give any additional effect to such a settlement, as against her, in the event of her surviving (*p*).

2. When the husband survives: it remains to consider the rights of the administrator of the wife to her *choses in action* in this event.

(*m*) *Heaton v. Hassell*, 4 Vin. Abr., p. 40, tit. Baron & Feme (D.), pl. 11, in *margin*; *Adams v. Cole*, Cas. temp. Talb. 168; *Cleland v. Cleland*, Prec. Chanc. 63; *Garforth v. Bradley*, 2 Ves. Sen. 675; *Burdon v. Dean*, 2 Ves. Jun. 607; *Elibank v. Montolieu*, 5 Ves. 737; *Mitford v. Mitford*, 9 Ves. 87; *Carr v. Taylor*, 10 Ves. 574.

(*n*) 1 Roper, *Husb. & Wife*, 298, 2nd edit.

(*o*) 1 Roper, *Husb. & Wife*, 303, 2nd edit.; *Lanoy v. Athol*, 2 Atk. 448. Cf. *Viditz v. O'Hagan*, [1900] 2 Ch. 87. See, however, *Sykes v. Meynal*, 1 Dick. 368, *contra*.

(*p*) *Stamper v. Barker*, 5 Madd. 157.

Executors of husband not entitled to wife's *choses in action* by reason of a post-nuptial settlement.

Law prior to Married Women's Property Act, 1882, when the husband survives.

Rights of administrator of wife to her choses in action, when her husband survives.

If the husband takes out letters of administration to her, (to which, as it has already appeared (*q*), he has exclusively the right,) he will be entitled, as such administrator, to all her personal estate which continued in action or unrecovered at her death. Therefore, where it was stipulated in marriage articles, that money in the funds, the property of the intended wife, *should be for her sole and separate use, as if she were sole and unmarried*, and the marriage took effect, and the wife died in the husband's lifetime without issue, and without having made any appointment of her separate property: the husband having subsequently died, a bill was filed by the next of kin of the wife against the executors of the husband, and it was held by Sir John Leach, M. R., that the husband was entitled to the funds, as her administrator, and that the expression "as if she were sole and unmarried" had no reference to the devolution of the property after her death (*r*).

If the husband should die before he has obtained a grant of administration, or after having taken out letters, before all her property in action has been reduced into possession, administration must be taken out to the wife, either generally, or *de bonis non*, as the case may require (*s*): Such administrator will be considered, in equity, as a trustee of what he receives for the personal representatives of the husband (*t*).

It is obvious, that in all the instances above stated, where

(*q*) *Ante*, p. 320.

(*r*) *Proudley v. Fielder*, 2 M. & K. 57. But where a husband and wife lived separate from each other, and at her death she was possessed of cash and bank-notes, arisen from property settled to her separate use, it was held by Sir L. Shadwell, V.-C., that the husband was entitled to them in his marital right; for that as she had not disposed of them, as she might have done, by deed or Will, the quality of separate property ceased at her death, and her husband was entitled *jure mariti* and need not become her administrator in order to entitle himself: *Molony v. Kennedy*, 10 Sim. 254. See also *Bird v. Peagrum*, 13 C. B. 650. The distinction between equitable separate use and statutory separate property seems to be that, as regards the latter, on the husband surviving the wife, the statute has defeated his *jus mariti*, and he must take administration to his wife's estate; whereas, with regard to the former, the quality of separate property ceases on the wife's death, and consequently the right of the husband (the *jus mariti*) subsists as if the separate use had never existed. See *Re Lambert's Estate*, 39 C. D. 626.

(*s*) *Betts v. Kimpton*, 2 B. & Adol. 273; *Att.-Gen. v. Partington*, 3 Hurlst. & C. 193; L. R. 4 H. L. 100; *In the goods of Harding*, L. R. 2 P. & D. 394.

(*t*) *Cart v. Rees*, cited in *Squib v. Wyn*, 1 P. Wms. 381; *Humphrey v. Bullen*, 1 Atk. 458; S. C., 11 Vin. Abr. 86; *Elliott v. Collier*, 3 Atk. 526.

the wife's right by survivorship, in case of her outliving her husband, would be barred by his having reduced her *choses in action* into possession in his lifetime, there, in the event of his surviving her, he may bring an action respecting such *choses in action* in his individual character, and must not sue as the administrator of his wife.

Thus where on a bond to the wife, *dum sola*, the husband gives a letter to another to receive the money, who receives it, and then the wife dies, the husband shall bring an action to recover it from the receiver, individually, and not as his wife's administrator (*u*). So where a legacy was left to a *feme sole*, who afterwards married, and then the husband and wife gave a letter of attorney to another to receive the money, who received it, and afterwards the wife died, and then the husband died; it was held that the action was well brought by the husband's administrator: because the receipt changed the property to the husband alone (*v*).

If the wife be a mortgagee in fee, the husband surviving her will be entitled to the mortgage, as her administrator, and where the wife died before the 31st December, 1881 (*x*), the heir would be a trustee for him. This was admitted in *Turner v. Crane* (*y*), where, however, the heir was held entitled, on the ground that there was no covenant for payment, a distinction which does not now prevail.

In a case where the wife and her second husband demised lands, which she held in dower from her first husband, for a term of years, reserving a rent; the rent became in arrear, and the wife died; her second husband was held entitled to the arrears, and not the heir of the first husband, who could not claim them, since he was a stranger to the lease (*a*).

Arrears of
rent.

It must be observed, that, at common law, if a *feme sole*

(*u*) *Huntley v. Griffith*, Moor. 452. So Fry, J., following this case, held the receipt by an agent appointed by the husband and wife of money forming part of the estate of an intestate, of which the wife was administratrix, amounted to a reduction into possession by the husband of the wife's distributive share of the money: *Re Barber*, 11 C. D. 442. See also *Fleet v. Perrins*, L. R. 4 Q. B. 500.

(*v*) *Ibid*.

(*x*) Under sect. 30 of the Conveyancing Act, 1881, in case of deaths after the commencement of the Act, hereditaments vested in a person by way of mortgage devolve to his personal representatives like chattels real.

(*y*) 1 Vern. 170; 1 Roper, Husb. & Wife, 205, 2nd edit.

(*a*) 2 Bro. 204, *b*, tit. Rents, pl. 10; 1 Roper, Husb. & Wife, 206, 2nd edit.

was seised of a rent service, charge, or seek, in fee, fee tail, or for life, which was behind and unpaid; and she took husband, and the rent was behind again, and then the wife died; the husband should not have the arrears grown due *before* the marriage, but for those become due during the coverture, the husband might have had an action of debt (*b*). But by the statute 32 Hen. VIII. c. 37, s. 3. if the husband survive the wife, he shall have the arrears incurred, as well before the marriage, as after (*c*).

Right of
presentation.

So if a husband be seised of an advowson in right of his wife, and the church become void during the coverture, the wife has a right of action (commenced under the old procedure by a writ of *quare impedit*), if she survive him, and the husband, if he survive her (*d*); even though he, by reason of her having had no issue, be not tenant by the curtesy (*e*): but if the church fell void *before* the coverture, the husband could not bring a *quare impedit* if he survived her (*f*).

In these cases, when it is said, that the husband could not at common law recover the arrears of rent due before the marriage, and that he could not have a *quare impedit* for a presentation which fell vacant before coverture, it must be understood (it is submitted), that he could not claim them as a marital right in his individual character: because it seems clear, that, as her administrator, he might at common law have recovered the rent (as soon as the estate of freehold was determined) in the former case, and could have maintained a *quare impedit* in the latter. The reason given by Lord Coke against the right of the husband, is, that the arrears of rent and the void church were merely in action before the marriage (*g*): Hence it should follow, that, like all other *choses in action* not reduced into possession, though they do not belong to the surviving husband *jure mariti*, they will go to him as his wife's administrator (*h*).

If, *previously* to the marriage, the wife obtained a judgment and then she and her husband sued out a *scire facias* and had an award of execution, but, before execution, the wife died; the

(*b*) Co. Lit. 162, *b*, 351, *b*. So for the arrears of an annuity to the wife: *Anon.*, Owen, 3.

(*c*) Co. Lit. 351, *b*.

(*e*) Wats. C. L. 71, 72.

(*g*) Co. Lit. 351, *b*.

(*h*) *Att.-Gen. v. Partington*, 3 Hurlst. & C. 205; L. R. 4 H. L. 100, accord.

(*d*) Co. Lit. 351, *b*.

(*f*) Co. Lit. 351, *b*.

husband was held not entitled to proceed as her administrator, but he might sue out a new *scire facias* by survivorship in his individual character (i). So in the case of *Forbes v. Phipps* (k), there was a decree of a Court of Equity, that one-sixth share of a residue, to which the wife was entitled, should be paid to *her and her husband*: The wife died before the money was received, and her husband being the survivor, it was determined that he should take the money under the decree by survivorship, and not as his wife's administrator so as to render the fund liable in his hands to her debts.

A singular case arose as to the husband's rights, as survivor, to his wife's reversionary *choses in action*. A woman who was entitled to a pecuniary legacy, as one of several joint-tenants in reversion after the death of a tenant for life of the fund, married, and then predeceased the tenant for life: The question was, whether, on the death of the tenant for life, the wife's share should go to the surviving joint-tenants or to her husband: and Turner, V.-C., decided in favour of the joint-tenants: His Honour held that, as the wife's interest was reversionary, the title of the husband could not arise till after her death in his lifetime; and that the case, therefore, did not fall within the principle of the rule as to chattels personal, but within that as to chattels real; and according to the latter rule, as the property did not rest in the husband, the joint-tenancy was not severed by the marriage, but continued till the death of his wife; and then the elder title of the other joint-tenants by survivorship prevailed (l).

Husband not
entitled where
wife died
joint-tenant.
of a rever-
sionary chose
in action.

(i) *Woodyer v. Gresham*, 1 Salk. 116.

(k) 1 Eden, Rep. 502. See also *Hore v. Woulfe*, 2 Ball & Beat. 424.

(l) *In the Trusts of Barton's Will*, 10 Hare, 12; *Armstrong v. Armstrong*, L. R. 7 Eq. 518. And the same would be the case though the chose in action were not reversionary if it had not been reduced into possession by the husband. See *Re Butler*, 38 C. D. 286, disapproving *Baillie v. Treharne*, 17 C. D. 388; *Palmer v. Rich*, [1897] 1 Ch. 134.

CHAPTER THE SECOND.

TO WHAT CHOSSES IN ACTION THE EXECUTOR OR ADMINISTRATOR IS ENTITLED, WHERE THE ACTION ACCRUES AFTER THE DEATH OF THE TESTATOR OR INTESTATE.

IT is now proposed to consider in what cases an executor or administrator may sue, where the cause of action accrues after the decease of the testator or intestate.

Actions for
torts done in
the executor's
time.

Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for the tort: And, under such circumstances, he has his option, either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character. If, however, he sues in his representative capacity, the endorsement of claim must, under Ord. III. r. 4, show in what capacity he sues.

This right of action, and option as to the form in which it shall be brought, exists in the executor or administrator, whether he has ever had actual possession of the property or not. Mr. Justice Buller, indeed, in *Cockerill v. Kynaston* (a), laid down, that if the goods, which were the subject of the action, were never in the actual possession of the executor or administrator, it is absolutely necessary for him to declare in that character: But that opinion has been since frequently overruled (b): For it is a rule of law, that the *property* of personal chattels draws to it the *possession*, so that the owner may bring either trespass or trover at his election against any stranger who takes them away (c): Now on the death of the testator or intestate, his executors or administrators are, in point of law, the owners of the goods which belonged to him; and consequently whether

(a) 4 T. R. 277, 281.

(b) *Bollard v. Spencer*, 7 T. R. 358; *Hollis v. Smith*, 10 East, 294; *Grimstead v. Shirley*, 2 Taunt. 117.

(c) Bro. Trespass, 303; *Hudson v. Hudson*, Latch. 214.

in actual possession of them, or not, before the tort committed, they may declare, as any other person may, upon their own property, when wrongfully damaged by another (*d*).

Therefore executors or administrators may maintain trespass for taking away the goods of the testator or intestate after his death, either in their own name, or in their representative character, whether they were ever actually possessed of them or not (*e*). And if they sue as executors or administrators, they may either declare that the deceased was possessed of the goods and the trespass committed after his death to the damage of the executors or administrators (*f*); or as the property in the goods draws to it the possession in law, they may declare on their own possession as executors (*g*). So with respect to the action of trover, if the goods of the testator are taken and converted after his death, and before the executor has obtained possession of them, he may either bring an action in his own name, without alleging himself executor (*h*), or he may sue as executor, and declare either that the testator was possessed of the goods and the defendant after his death converted them (*i*), or he may allege that he himself was possessed as executor, and the defendant converted them (*k*).

It has already appeared that an executor or administrator may maintain these actions, although the injury was done before probate or administration granted (*l*).

An executor, as such, could, under the old practice, maintain

(*d*) *Hollis v. Smith*, 10 East, 295.

(*e*) *Adams v. Cheverel*, Cro. Jac. 113.

(*f*) Cro. Jac. 113.

(*g*) 2 Saund. 47 n., note to *Wilbraham v. Snow*.

(*h*) *Hole v. King*, Com. Rep. 163; *Jenkins v. Plombe*, 6 Mod. 181.

(*i*) *Hudson v. Hudson*, Latch. 214.

(*k*) *Anon.*, Comberb. 451; 2 Saund. 47 n., note to *Wilbraham v. Snow*. Thus, in *Fraser v. The Swansea Canal Co.*, 1 Adol. & Ell. 354, the mortgagee of the lease of a colliery, together with the machinery and barges belonging thereto, died before the day of redemption: After his death, the mortgagor, who had remained in possession, made default in the payment of the mortgage debt, but was not dispossessed by the administrator of the mortgagee: The mortgagor subsequently demised the mortgaged property to a third party, who took possession under such demise, and put his name on the barges: During such possession, the barges, together with a quantity of coal, the produce of the colliery, were illegally seized by the defendants for tolls due from the mortgagor's lessee: And it was held, that the plaintiff, as administrator, had sufficient property in the coal raised from the mines after he took out administration, and in the barges marked with the name of the mortgagor's lessee, to maintain trover.

(*l*) *Ante*, p. 477 *et seq.*

quare impedit, for a disturbance in his own time (*m*), or ejectment, where the testator had a lease for years, or from year to year, upon an ouster after his death (*n*). The old process of ejectment and ouster was, however, abolished by the Common Law Procedure Act, 1852, in favour of a writ in ejectment, which, in its turn, has given place to an action for the recovery of land, which is commenced by an ordinary writ (*o*).

Actions on
contracts
made with
the executor.

So with respect to matters of contract, it has been decided, in a variety of cases, that an executor or administrator may sue *as such*, as well as in his own name, upon a contract made with him in his representative character: And this he may do, not only in cases where the consideration flows from the deceased, but also in cases where the consideration flows directly from himself as executor. Thus an executor might declare, as such, in *assumpsit*, not only on an account stated with him as executor *concerning money due to the testator* from the defendant, but also on an account stated with him as executor *concerning money due to him as executor* (*p*). Again, an executor may maintain an action, as such, for money lent by him *as executor* (*q*). So where money belonging to the estate of the testator was received after his death, the executor might declare, on the implied *assumpsit*, for money had and received to his use as executor (*r*). So in *Ord v. Fenwick* (*s*), it was held that an administratrix, as such, might maintain *assumpsit*, for money paid by her as administratrix to the use of the defendant: And Lord Ellenborough laid down, that if an executor is sued on the obligation of the testator, who had become surety for a joint obligor, and is thus compelled to pay, an action will lie by the executor, as such, to recover the money so paid (*t*). So in *Clarke v. Hougham* (*u*), it was held, that where an administrator, in his representative character, has paid that which he ought not, he may in the same character recover it back again. Again, in

(*m*) *Smallwood v. Bishop of Coventry*, Cro. Eliz. 207.

(*n*) *Slade's Case*, 4 Co. 95, *a*; *Moreton's Case*, 1 Ventr. 30; *Doe v. Porter*, 3 T. R. 13.

(*o*) See, as to the procedure in such an action, Foa, *Law of Landlord and Tenant*, 3rd edit. pp. 697 *et seq.*

(*p*) *Needham v. Croke*, 1 Freem. 538; *Thompson v. Stent*, 1 Taunt. 322.

(*q*) *Webster v. Spencer*, 3 B. & A. 365.

(*r*) *Foxwist v. Tremaine*, 2 Saund. 208.

(*s*) 3 East, 103.

(*t*) 3 East, 105, 106.

(*u*) 2 B. & C. 149.

Cowell v. Watts (x), it was decided that an action may be maintained by an administratrix, as such, for goods sold and delivered by her as administratrix after the death of the intestate. So in the case of *Marshall v. Broadhurst* (y), where the testator had agreed to do certain work, and died before the work was begun, and the executors did the work, using the materials of the testator, and then brought an action, declaring in their representative character for work and labour done, materials found, and goods sold and delivered by the plaintiffs as executors; it was holden by the Court of Exchequer, that they might recover the value of the materials; and the Court seemed to be further of opinion, that they might recover also for the work and labour as executors. And in *Edwards v. Grace* (z), it was afterwards expressly decided in the same Court, that an executor might sue, as such, for work done by him as executor. So in the case of *Aspinall and others v. Wake* (a), where the plaintiffs, being executors, had continued to work the leasehold quarries of their testator, and had shipped off for the defendant, from time to time, cargoes of stone, partly dug before, and partly after the testator's death, and the defendant had accepted bills, for the price of some of the cargoes, drawn by the plaintiffs as executors; it was held that they might well sue, *as executors*, for the price of the remainder of the cargoes. And, lastly, in the case of *Werner v. Humphreys* (b), where a coat had been ordered by the defendant of a tailor, and had been cut out of the tailor's own cloth, tacked together and tried on in his lifetime, but was finished and delivered after his death by his administratrix; it was held that she could not sue for the price, as for goods sold and delivered by the intestate, but that the proper form of action was for goods sold and delivered by her as administratrix.

So with respect to negotiable instruments, it was decided in *King v. Thom* (c), that if a bill be endorsed to A. and B. as executors, they may declare as such, in an action against the acceptor. So in *Partridge v. Court* (d), it was held that an administrator may sue, as such, on a promissory note given to him as administrator since the death of the intestate. So where

(x) 6 East, 405.

(y) 1 Crompt & Jerv. 403.

(z) 2 M. & W. 190.

(a) 10 Bingh. 51.

(b) 2 M. & Gr. 853; *Mosley v. Rendell*, L. R. 6 Q. B. 338.(c) 1 Tr. R. 487, recognized by Tyndall, C. J., in *Aspinall v. Wake*, 10 Bingh. 55.

(d) 5 Price, 412, confirmed in error, 7 Price, 591.

a bill of exchange was endorsed generally, but delivered to S. C., as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: it was held, in *Catherwood v. Chabaud* (e), that the administrator *de bonis non* of J. C. might sue upon the bill, on the ground that, where the cause of action is such that the first administrator may sue in his representative character, the right of action devolves on the administrator *de bonis non*.

The principle on which these cases was decided has not been settled without conflict. Several old cases may be found, in which it was considered that the contracts made with an executor or administrator were personal to him, and that he must sue for them in his own right, and not in his representative capacity: and, particularly, in the instance of negotiable instruments, it was conceived, until very modern times, that if an executor took a bill or note from a debtor to the estate of his testator, a new debt was thereby created, which must be declared on as such. However, the rule may now be regarded as firmly established by the later cases, that wherever the money recovered will be assets, the executor may sue for it, and declare in his representative character (f).

In the case of several executors, although it is established by these authorities, that the circumstance of the money to be recovered on a contract being assets warrants them in suing for it in their representative character; yet it is not established that in all cases where the money recovered would be assets, *all* the executors may join in suing on a contract, whether they *all* made the contract or not. Thus in *Heath v. Chilton* (g), where two out of three executors (who had alone proved the Will) authorized an attorney to receive rents due to the estate of the testator, and to give receipts in their names, and the rents were received, and receipts given accordingly; it was held, that the *three* executors could not jointly sue the attorney for the money, unless it was found by the jury, that two contracted with him on account of themselves and the other co-executor, or generally on account of the estate, with a view to the interference of the

(e) 1 B. & C. 150; cf. *post*, p. 685.

(f) *Cowell v. Watts*, 6 East, 410, 411, 412; *Heath v. Chilton*, 12 M. & W. 637, *per* Parke, B.; *Abbott v. Parfitt*, L. R. 6 Q. B. 346, distinguishing *Bolingbroke v. Kerr*, L. R. 1 Ex. 222, in which case the business was not carried on for the benefit of the estate. As to set off in these cases, see *post*, Pt. v. Bk. I. Ch. I.

(g) 12 M. & W. 632.

co-executor, in case he should choose to take a part in the management of it.

Where the executor or administrator took a *bond* from a simple contract debtor to the estate of the deceased, though it was given to him *as executor or administrator*, it was held that he could not sue in his representative capacity on such bond; because the effect of the bond was to extinguish the simple contract debt, creating a new and personal obligation of a higher nature (*h*).

Where an agent having property of his principal in his hands, and being ignorant of the death of his principal, for the purpose of transmitting the property, obtained a bill of exchange for the value, and endorsed it specially to his principal; it was held, that as the property, for which the bill was remitted, belonged to the principal's estate, it was competent to his administrator to elect to take the bill as a mode of payment, that the property vested in him, and that he acquired a right to sue upon the bill in that character (*i*).

It was assumed by counsel, in arguing against the right of the executor to sue as such, in *Clarke v. Hougham* (*k*), that where a payment by an executor or administrator is a *devastavit*, the personal representative can only sue to recover it back in his own name: But Mr. Justice Bayley, in delivering his judgment, observed: "That is a principle to which I cannot assent: on the contrary, when he discovers that he has in his representative character paid that which he ought not, he may in the same character recover it again. The money was assets; and if the suit be as executor or administrator, it will continue assets; but if the suit be in the individual capacity, the demand will be in the first instance subject to a set-off, or when recovered will be liable to the plaintiff's debts. A *devastavit* is a wrong, and

Actions to
recover back
money
wrongly paid.

(*h*) *Hosier v. Lord Arundell*, 3 Bos. & Pull. 7; *Partridge v. Court*, 5 Price, 419, 420, 421; *Price v. Moulton*, 10 C. B. 561, considered in *Commissioners of Stamps v. Hope*, [1891] A. C. 476, where it is stated that their lordships would hesitate to assent to a proposition that the reported language of the Court in some places is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant, and notwithstanding the plain intention of the parties to the contrary.

(*i*) *Murray v. E. I. Company*, 5 B. & A. 204. See now the Bills of Exchange Act, 1882, s. 7 (3), and s. 34 (3).

(*k*) 2 B. & C. 149 (1823); *ante*, p. 558.

the law will not compel an executor to persevere in a wrong" (l).

Actions on judgments recovered by executors or administrators.

An executor or administrator may bring an action on a judgment recovered by him as executor or administrator: and he may sue in this case either in his representative character, or in his own name (m).

Claims by or against an executor or administrator as such,

(l) 2 B. & C. 155. But in the case of *Munt, Executors, &c. v. Stokes* (1792), 4 T. R. 561, the testator having borrowed money on a *respondentia* contract, prohibited by the laws of this country, his executors, the plaintiffs, refunded the money to the lenders, the defendants; the Court held, on the merits, that the plaintiffs could not recover back this money, since the plaintiffs, knowing the whole transaction, and the law also, as they were bound to know, voluntarily paid it, and there was nothing contrary to conscience in the defendants receiving the money which they had advanced.

(m) *Crawford v. Whittal*, 1 Dougl. 4, n. (1). Except cases of decrees in equity, and where specific remedies are given by statute, wherever there is a final order or judgment of the Court for payment of a sum of money an action will lie thereon. Cases of decrees in equity are distinguishable, for there is no implied promise to pay a mere equitable debt: *Hutchinson v. Gillespie*, 11 Exch. 798. So, too, orders for alimony *pendente lite* payable under an order of the Probate Division are distinguishable, having regard to sect. 52 of 20 & 21 Vict. c. 85: *Bailey v. Bailey*, 13 Q. B. D. 855. Sect. 63 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), provides that no action shall be brought in the County Court on any judgment of the High Court. Foreign judgments in their nature final and conclusive are also enforceable by action, and no difference exists between English and foreign judgments in this respect: *Grant v. Easton*, 13 Q. B. D. 302; *Nourion v. Freeman*, 15 A. C. 1. In *Stewart v. Rhodes*, [1900] 1 Ch. 386, the Court of Appeal held, that under 1 & 2 Vict. c. 110, s. 14, there is no power after the death of a judgment debtor to make a charging order against his executor in respect of a judgment debt of the deceased, unless in some way judgment has been first obtained against the executor; and further, that leave given under Rule 23 of Ord. XLII. to issue execution against the executor of a deceased judgment debtor does not operate as a judgment against the executor; it dispenses with the necessity of recovering judgment against him, and consequently does not satisfy the requirements of sects. 14 and 15 of 1 & 2 Vict. c. 110. In this case the question was raised whether under the present practice a creditor having recovered judgment against the testator can get another judgment *de donis testatoris* against the executor for the same debt, and Lindley, M. R., said (at p. 403): "What does that come to? If the creditor cannot do that, it follows that he cannot get a charging order at all. But if he cannot, why is it? There were formerly proceedings on judgments against executors by means of *scire facias* and otherwise, and there was no difficulty about it. If all that practice is abolished (a question which we have not yet had the opportunity of fully considering), what follows? Not that the creditor has no remedy, but that he must bring an administration action. That is the modern practice, and that explains why, from the passing of 1 & 2 Vict. c. 110, no one has ever heard of a charging order being obtained against an executor upon a judgment recovered against his testator." See further as to the remedy on a judgment obtained against the testator, *post*, Pt. v. Bk. II. Ch. I.

may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*n*).

In the above cases of contract, the promise sued upon by the executor was expressly or impliedly made to himself in his representative character; but it is clear, that in many cases an action on which the deceased himself could not have sued, may accrue to the executor or administrator in his own time, upon a contract made with the testator or intestate in his lifetime.

Suits accruing in time of executor on contracts made with testator:

It has already appeared, that where a cause of action accrued in the lifetime of the testator on a contract made to him, without naming his executors, or to him and *his assigns*, such *chose in action*, generally speaking, is transmitted to the executor (*o*). And the executor will also be entitled to sue on such a contract, although the action does not accrue till after the death of the testator. Thus, if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day, and before any lease made, if A. refuse to grant the lease, when the day arrives, to the executor of B., the executor shall have an action as such on the covenant (*p*). So in the case of *Husband v. Pollard* (*q*), a father possessed of a term for years, held of the church, and renewable every seven years, assigned this lease to his son in trust for himself for life, remainder in trust for the son, his executors, administrators, and assigns, and the father covenanted to renew the lease every seven years as long as he should live; the son died, and the seven years passed, upon which the executors of the son brought a bill to compel the father to renew the lease at his own expense; and it was decreed accordingly.

So if A. covenant to grant a lease to I. S. and *his assigns* by Christmas, and I. S. dies before that time, and before the grant of the lease, it must be made to his executors, as his assigns, or they may bring covenant (*r*). So in the case of a contract to

on a contract made with the testator and his assigns.

(*n*) Rules of the Supreme Court, 1883, Ord. XVIII. r. 5; *Tredegar v. Roberts*, [1914] 1 K. B. 283. This rule, it seems, does not apply to counterclaims: *Macdonald v. Carrington*, 4 C. P. D. 28; but see *Bankes v. Jarvis*, [1903] 1 K. B. 549.

(*o*) *Ante*, p. 607.

(*p*) *Chapman v. Dalton*, Plowd. 286; Wentw. Off. Ex. 188, 14th edit.

(*q*) Cited in *Randal v. Randal*, 2 P. Wms. 467.

(*r*) Wentw. Off. Ex. 215, 14th edit.; Vin. Abr. Executors (X.), pl. 10.

deliver a horse on a given day to B., or *his assigns*, if B. die before the day limited for the delivery of the horse, his executor may maintain an action on the contract, if A. refuse to deliver the horse to him, because, by law, he is the assignee of B. for such a purpose, and represents his person as to receiving any chattels real or personal (*s*); although if A. in his lifetime had appointed I. S. to receive the horse, I. S. would have been entitled as assignee in deed (*t*). So if a man be bound to deliver a true rental, &c., to I. N., or his assignee, at the end of twenty years, and he makes an executor, and dies before the end of twenty years, there the obligor is bound to deliver a true rental to the executor; for he is an assignee in law (*u*). So where one was bound to stand to the award of two arbitrators, who awarded that the party should pay unto a stranger, or his assigns, 200*l*. before such a day; the stranger before the day died, and B. took letters of administration: it was the opinion of the whole Court that the money should be paid to the administrator; for he is assignee: and by Gawdy, J.: If the word assignee had been left out, yet the payment ought to be made to the administrator: *quod Coke affirmavit* (*x*).

But where the condition of an obligation is, that if the obligor pay 20*l*. to such a person as the obligee by his last Will in writing shall appoint it to be paid, then the obligation to be void; if the obligee appoint no person to whom it shall be paid, but makes his last Will, and makes executors thereby, yet the 20*l*. shall not be paid to the executors; for here it appears that this was to have been paid to an assignee in fact, to be made by the obligee by his appointment, and not to an assignee in law (*y*). The law will never seek out an assignee in law, when there may be an assignee in fact (*z*).

Suits accruing
to executors
by remainder.

Likewise a right to sue, which never existed in the testator or intestate, may accrue to the executor or administrator by remainder: as where a lease is made to B. for life, the remainder to his executors for years (*a*), or where a lease for years is

(*s*) *Chapman v. Dalton*, Plowd. 288.

(*t*) *Ibid.*

(*u*) Bro. Abr. tit. Deputy.

(*x*) *Anon.*, 1 Leon. 316.

(*y*) 1 Roll. Abr. 915; Executors (X.), pl. 2; but see *ante*, p. 608, n. (*k*).

(*z*) *Goodall's Case*, 5 Co. 97, *a*; but see *Chapman v. Dalton*, Plowd. 288. *supra*.

(*a*) Wentw. Off. Ex. 189, 14th ed.; Co Lit. 54, *b*; *ante*, p. 536 *et seq.*

bequeathed by Will to A. for life and afterwards to B., who dies before A.; although B. never had the term in him, yet it shall devolve on his executors, who may maintain an action in respect of it (*b*).

So a suit may accrue in the time of the executor or administrator by reason of a condition made to the deceased.—As where cattle, plate, or other chattels, were granted by the testator upon condition that if A. did not pay such a sum of money, or do some other act as the testator appointed, &c., and this condition is not performed after the testator's death, now is the chattel come back to the executor, and he may maintain an action respecting it: So where the condition is that the testator or his executors shall pay the money to avoid the grant; as where he pledges a jewel or a piece of plate, and before the day limited for payment, he dies, his executor is entitled to redeem at the day and place appointed (*c*).

Suits accruing to executor by reason of conditions made to testator:

If no time be set for the redemption of the pledge, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee; and in case of the death of the pledgor without such a demand, his personal representative may redeem (*d*). If the pledgee dies, the tender should be to the executor of the pledgee (*e*).

in what cases the executor of the pledgor may redeem.

Where money has been paid into Court in an action, and the action has come to an end by reason of the death of the plaintiff or defendant, the Court has jurisdiction on the application of the personal representatives of the deceased party to order payment out to them on their showing such grounds as the deceased would have had to show if he had been alive (*f*).

Payment out of Court.

(*b*) Wentw. Off. Ex. 181, 14th edit.

(*c*) Wentw. Off. Ex. 181, 14th edit.; Toller, 164; Bac. Abr. Bailment (B.).

(*d*) Com. Dig. tit. Mortgage (B.), and Story, Equity, 12th. edit. (1877), § 1032. The contrary laid down in *Ratcliff v. Davies*, 1 Bulstr. 29, and referred to in *Kemp v. Westbrook*, 1 Ves. Sen. 278, would not, it seems, now be sustained. See *Vanderzee v. Willis*, 3 Bro. C. C. 21, and other cases of redemption in equity referred to in Story on Bailments, § 348.

(*e*) 1 Bulstr. 29; Cro. Jac. 244; 3 Salk. 267; Bac. Abr. Bailment (B.).

(*f*) *Brown v. Feeney*, [1906] 1 K. B. 563; *Maxwell v. Wolseley*, [1907] 1 K. B. 274.

CHAPTER THE THIRD.

THE TITLE OF AN EXECUTOR OR ADMINISTRATOR TO THE EXECUTORY AND CONTINGENT INTERESTS OF THE TESTATOR OR INTESTATE.

CONTINGENT and executory interests, whether in real or personal estate, are transmissible to the representative of a party dying before the contingency, upon which they depend, takes effect (a).

Thus, in *Pinbury v. Elkin* (b), the testator, in case his wife should die without issue by him, then, after her decease, gave 80*l.* to his brother; after the testator's death, the brother died in the lifetime of the widow, who afterwards died without leaving any issue: The Court (Lord Macclesfield) held that this possibility devolved to the executors of the brother, though he died before the contingency happened; and decreed the legacy accordingly with interest from the widow's death.

So in *King v. Withers* (c), the testator devised land to his son B.; but if he should die without issue male of his body, then living, or which might be afterwards born, that then his daughter should receive at her age of twenty-one, or day of marriage, which should first happen, the sum of 3,500*l.* (over and above a portion bequeathed to her); but in case the contingency of the said son's dying should not happen before his daughter's said age, or day of marriage, that then she should receive that sum whenever such contingency might happen; and charged the said legacy or portion on the real estate: The daughter married, having attained her age of twenty-one, and died in the lifetime of her brother B., who afterwards died without issue male: Lord Talbot decreed, that the legacy should be raised for the benefit of the administrator (the husband)

(a) *Fearne*, Conting. Rem. 554; 2 *Saund.* 388, *n.*, note to *Purefoy v. Rogers*. See also stat. 1 Vict. c. 26 (the Wills Act), s. 3.

(b) 1 P. Wms. 564.

(c) *Cas. temp. Talb.* 117.

of the daughter: and he held, that though it did not absolutely vest, because it might never arise, yet it so far vested as to be transmissible to the representative. This decree was afterwards affirmed in the House of Lords.

In *Chauncey v. Graydon* (*d*), legacies were devised to children, to be transferred to them at their respective ages of twenty-one, or days of marriage; and in case any of them should die under that age, or marry without consent, &c., his or her share should go to the others at their ages of twenty-one: Lord Hardwicke held, that a share accruing by the forfeiture of a child's marrying without consent vested in another who attained twenty-one, but died before such forfeiture, so as to entitle the personal representative of such deceased child to an equal share thereof, with the other surviving children; for (said he) where either real or personal estate is given upon a contingency, and that contingency does not take effect in the lifetime of the devisee, yet if real, his heir, and if personal, his executor, will be entitled to it: for though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable, and is transmissible to the representative of the devisee.

So in *Peck v. Parrott* (*e*), B., in consideration of natural love and affection for her niece, and to secure to her separate use her personal estate after her own decease, granted all her personal estate to trustees in trust for herself during her natural life, and after her decease, and payment of her debts and funeral expenses, in trust for the sole and separate use of her niece alone, and not for her husband, or for such person as she should appoint; the niece died in the lifetime of B.; and after B.'s death, her (B.'s) executor and residuary legatee filed his bill against the personal representative of the niece, for this personal estate: Lord Hardwicke said, that, under a trust, a contingent interest might go to the executor or administrator, though not vested in the person during his life; and that in the same manner the contingent interest here would go to the representative of the niece; and accordingly dismissed the bill.

These cases, and others referred to in the note below (*f*),

(*d*) 2 Atk. 616.

(*e*) 1 Ves. Sen. 236.

(*f*) *Barnes v. Allen*, 1 Bro. C. C. 181; 3 Ves. 208; *Perry v. Woods*, 3 Ves. 234; *Massey v. Hudson*, 2 Meriv. 130; *Stanley v. Wise*, 1 Cox, 432; *Taylor v. Graham*, 3 App. Cas. 1287; *Re Cresswell*, 24 O. D. 102.

establish the principle, that contingent and executory interests, though they do not vest in possession, may vest in right so as to be transmissible to executors or administrators (*g*). But it is obvious that where the contingency, upon which the interest depends, is the endurance of the life of the party entitled to it till a particular period, the interest itself will be extinguished by the death of the party before the period arrives, and will not be transmissible to his executors or administrators. The only case in which a contingent future interest is not transmissible would seem to be where the being in existence when the contingency happens is an essential part of the description of the person who is to take (*h*).

This consideration leads directly to that portion of the doctrine of Lapsed Legacies, which has reference to lapse occasioned by the death of the legatee before the death of the testator, or before any other period, upon the arrival of which in the lifetime of the legatee, the right to the legacy depends. But it will be convenient to postpone the investigation of this doctrine, and to consider it hereafter, together with the subject of Legacies generally.

The executor of the object of a power cannot be an appointee.

It may be observed in this place, that the executor or administrator of the object of a power cannot be an appointee under it: Thus where a husband gives his wife a power of appointment of a fund in favour of his children, and a child dies without any appointment having been made to him, no part can be appointed to his executor or administrator (*i*).

(*g*) *Secus*, in the case of a mere possibility, or *spes successionis*, although it has been held that a possibility of reverter on failure of a fee simple conditional is devisable by virtue of sect. 3 of the Wills Act, 1837: *Pemberton v. Barnes*, [1899] 1 Ch. 544. Although a mere expectancy or possibility is not transmissible to executors or administrators, yet it is assignable in equity for value: *Tailby v. Official Receiver*, 13 App. Cas. 523, 543; *Re Dallas*, [1904] 2 Ch. 385.

(*h*) *Per* Kay, J., in *Re Cresswell*, 24 C. D. 102, 107.

(*i*) *Maddison v. Andrew*, 1 Ves. Sen. 59.

CHAPTER THE FOURTH.

THE CONTINUANCE BY THE EXECUTOR OR ADMINISTRATOR OF
ACTIONS COMMENCED BY THE TESTATOR OR INTESTATE.

THE practice with respect to the continuance of suits when the cause of action survives to the executor or administrator of the deceased is now regulated by Order XVII. of the Rules of the Supreme Court, 1883, which provides:—

Rule “1. A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy, of any of the parties if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but the judgment may in such case be entered, notwithstanding the death.

Change of parties by death, &c.

“2. In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest (if any) of such party, be made a party, or be served with notice in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the cause or matter as may be just.

Court may order successor to be made a party, or served with notice.

“3. In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by, or against, the person to, or upon whom, such estate or title has come or devolved.

Action may be continued.

“4. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or

Order to carry on proceedings.

liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence (a).

Service of
order to con-
tinue action.

"5. An order obtained as in the last preceding rule mentioned shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons.

Application
to discharge
order by
person under
no disability,
or having a
guardian.

"6. Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the cause or matter, shall be served with such order as in Rule 4 mentioned, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the service thereof.

By person
under dis-
ability,
having no
guardian.

"7. Where any person being under any disability other than coverture, and not having had a guardian *ad litem* in the cause or matter, is served with any such order as in Rule 4 mentioned, such person may apply to the Court or a Judge to discharge or vary such order at any time within twelve days from the appointment of a guardian *ad litem* for such party, and until such period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person.

Death of sole
plaintiff or
defendant.

"8. When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against

(a) The representative of a sole executor cannot continue proceedings unless he also represents the original testator: *Willcocks v. Doughty*, 29 L. R. Ir. 17.

whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or the person entitled to proceed) to proceed within such time as may be ordered: and in default of such proceeding, judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued; and in such case, if the plaintiff has died, the execution may issue as in the case provided for by Order XLII. rule 23.

“9. Where any cause or matter becomes abated, or in the case of any such change of interest as is by this Order provided for, the solicitor for the plaintiff or person having the conduct of the cause or matter, as the case may be, shall certify the fact to the proper officer, who shall cause an entry thereof to be made in the cause-book opposite to the name of such cause or matter.

Solicitor of
plaintiff to
give notice of
abatement.

“10. Where any cause or matter shall have been standing for one year in the Cause-Book marked as ‘Abated,’ or standing over generally, such cause or matter at the expiration of the year shall be struck out of the Cause-Book.”

Abated cause,
&c., to be
struck out.

This Order, so far as it relates to the death of a plaintiff or defendant, seems to be in substance a re-enactment of the provisions of the Common Law Procedure Act, 1852. Before that Act, if a sole plaintiff or defendant died before verdict or judgment by default, the plaintiff or his executor was obliged to commence a new action against the defendant or his executor, provided the cause of action survived to or against the executor. But by sect. 135 of the Common Law Procedure Act, 1852, it was enacted that the death of a plaintiff or defendant should not cause the action to abate, but that it might be continued as provided by that Act. And by sect. 137, in case of the death of a sole plaintiff or the sole surviving plaintiff, the legal representative of such plaintiff might, by leave of the Court or a Judge, enter a suggestion of the death, and that he was the legal representative, and the action thereupon proceeded, and the truth of the suggestion was triable thereat, and the judgment followed the verdict as if the person making such suggestion was originally plaintiff. This section did not apply to personal actions which would not survive to the executor (*b*).

So also that part of the above Rule 1, which enacts that there shall be no abatement by reason of the death of either party

(*b*) *Flinn v. Perkins*, 32 L. J. Q. B. 10.

between the verdict or finding of the issues of fact and judgment, but that the judgment may, in such case, be entered, notwithstanding the death, takes the place of the provision of sect. 139 of the Common Law Procedure Act, 1852 (c), which was a re-enactment of the stat. 17 Car. II. c. 8, s. 1, which related to proceedings at Common Law, and the 52nd section of 15 & 16 Vict. c. 86, which dealt with the procedure in equity. This portion of the rule extends, as did the old law, to all personal actions, notwithstanding that the cause of action could not have survived to the representative of the deceased, as for a libel, negligence, &c.

Under the procedure in force before this Rule, in the case of the death of a party between verdict and judgment, judgment might be entered as if the party were still living, but there must have been a revival by the executor to get execution (d). The statute of 17 Car. II. referred to above was held to make a judgment entered up under it equivalent to a judgment entered up during the lifetime of the deceased party (e). It did not apply to a non-suit (f); but, as it has already been shown, it did apply to actions which do not survive to the executor (g).

Rule 1 of Order XVII. does not keep an action alive as against the estate of a deceased party unless the estate has devolved on some one who is a party to the action (k).

Where sole
plaintiff dies;
right of his
representa-
tive:

In the case of the death of a sole plaintiff or a sole surviving plaintiff it is necessary for the personal representative of the plaintiff to get an order (which may be obtained *ex parte*) for leave to continue the action (l), and if he does not do so, so that there is no person before the Court in whom the action is vested, the action if called on for trial will be struck out (m). Or the defendant (or the person against whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or person entitled to proceed) to proceed within

rights of
defendant.

(c) Repealed by stat. 46 & 47 Vict. c. 49, s. 3.

(d) A writ of revivor is no longer necessary, but leave must be obtained under Ord. XLII. r. 23.

(e) *Colebeck v. Peck*, 2 Ld. Raym. 1280; *Burnett v. Holden*, 1 Lev. 277.

(f) *Dowbiggin v. Harrison*, 10 B. & C. 480.

(g) *Palmer v. Cohen*, 2 B. & Ad. 966; *Kramer v. Waymark*, L. R. 1 Exch. 241.

(k) *Re Shephard*, 43 C. D. 131.

(l) *Re Atkins' Estate*, 1 C. D. 82; and see Ord. XVII. r. 4.

(m) *Eldridge v. Burgess*, 7 C. D. 411.

such time as may be ordered, and in default of such proceeding, judgment may be entered for the defendant (*n*), or it would seem the action may be dismissed for want of prosecution (*o*); but it would seem, in such case, that the defendant must, before applying to dismiss, either get an order appointing some person to represent the estate of the deceased, under Order XVI. rule 46, or, where there is a personal representative, give notice to him. Or the defendant may get an order staying the action (*p*).

An executor obtaining an order to continue an action even after judgment becomes liable for costs *ab initio* in the same manner as if the action had been commenced by him, though without prejudice to an indemnity out of the estate (*q*). If the plaintiff dies between verdict and judgment, judgment may be entered notwithstanding the death, but where any change has taken place, by death, or otherwise, in the parties entitled to execution, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly, and such Court or a judge, if satisfied that the party so applying is entitled to issue execution, may make an order to that effect, or may order an issue to be tried (*r*). Where, after judgment, the plaintiff died, having made a Will and appointed executors, an application to the Court *ex parte* on behalf of the executors for leave to issue execution was granted on production of the probate, and unless the executor has obtained such leave he is not entitled to issue a bankruptcy notice (*s*). Formerly the mode in which an executor got execution, where a sole plaintiff died after final judgment and before execution, was by reviving the judgment.

Death of plaintiff between verdict and judgment.

Leave to issue execution.

It would seem that no motion for a new trial can be made where the plaintiff has died since the trial, until probate or administration to the deceased has been obtained (*t*).

New trial cannot be applied for before administration granted.

The power (which formerly existed) of the Court or judge to order judgment to be entered *nunc pro tunc* is confirmed by

Entry of judgment *nunc pro tunc*.

(*n*) Ord. XVII. r. 8.

(*o*) *Wright v. Swindon Rail. Co.*, 4 C. D. 164.

(*p*) *Wingrove v. Thompson*, 11 C. D. 419; *Warder v. Saunders*, 10 Q. B. D. 114.

(*q*) *Boynton v. Boynton*, 4 App. Cas. 733; *Re London Drapery Stores*, [1898] 2 Ch. 684.

(*r*) Ord. XLII. r. 23; see *Coleman v. Coleman*, [1920] P. 71.

(*s*) *Re Woodall*, 13 Q. B. D. 479; see *Re Bagley*, [1911] 1 K. B. 317.

(*t*) *Lloyd v. Ogleby*, 5 C. B. N. S. 667.

Order XLI. rule 3, of the Rules of the Supreme Court, 1883, which now govern the procedure, whereby it is enacted that where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day, on which such judgment is pronounced, unless the Court or judge shall otherwise order, and the judgment shall take effect from that date, *provided that by special leave of the Court or a judge, a judgment may be ante-dated or post-dated (u).*

Writ of *fi. fa.* issued in the life of judgment creditor may be executed after his death.

If the plaintiff die after a *fi. facias* sued out, the writ may, notwithstanding, be executed, and his executor or administrator shall have the money; or if there be no executor, and administration be not as yet granted, the money shall be brought into Court, and there deposited until some person appear to claim it as representative of the deceased (y).

After judgment and before execution.

Formerly, where one of several plaintiffs in a personal action died after judgment and before execution, execution could be had by the survivors within a year after judgment without reviving the judgment. But the execution in such case had to be taken out in the joint names of all the plaintiffs; otherwise it would not have been warranted by the judgment.

This case would now seem to be governed by Order XLII. rule 23, since there has been a change in the parties entitled to execution.

And where judgment has been given against two or more defendants, if one or some of such defendants die within six years after judgment and before execution, execution may still be issued against the estates of the survivors or survivor without obtaining any order for that purpose; but if it is desired to enforce the judgment against the estate of the deceased person or persons, an order under Order XLII. rule 23, Rules of the Supreme Court, 1883, is necessary (z).

Where *certiorari* lies for executors.

An inquisition of *felo de se*, before the coroner *super visum corporis*(a), may be removed by the executors or administrators

(u) Where between the trial of the action and the delivery of judgment one of the defendants died, the judgment was dated as of the last day of the trial: *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; [1898] 2 Ch. 358.

(y) *Clerk v. Withers*, 2 Ld. Raym. 1072; 1 Chit. Archb. 881, 14th edit. A writ of sequestration, however, is suspended by the death of the person at whose instance it issued, until it is revived: *Wharram v. Broughton*, 1 Ves. Sen. 183.

(z) *Davis v. Andrews* (1884), W. N. 94; D. C. P. 8th edit. p. 722.

(a) The coroner has no jurisdiction if the body cannot be found, as he can only hold an inquest *super visum corporis*. See the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 4.

of the deceased into the King's Bench Division by *certiorari*, and there quashed (*b*); or the inquisition may, after such removal, be *traversed* by the executors or administrators (*c*).

Generally speaking, the death of the plaintiff countermands a warrant of attorney to confess judgment (*d*). Yet, if the warrant of attorney be to enter up judgment *at the suit of A., his executors or administrators*, it seems that on the death of A., the Court will give his executors or administrators leave to enter up judgment thereon (*e*). But judgment cannot be entered up after the death of the plaintiff, on a warrant of attorney empowering him to enter up judgment to secure the payment of a sum of money *to the plaintiff, his executors and administrators* (*f*).

When an executor may enter up judgment on a warrant of attorney given to deceased.

However, formerly, if the plaintiff died in vacation, within a year after the giving of the warrant of attorney, judgment might be entered up of course, at any time after, in that vacation (*g*); and it would have been a good judgment at common law, as of the preceding term, though it was not so upon the Statute of Frauds, in respect of purchasers, but from the signing (*h*). By rule 56, Practice Rules H. T., 1853, it was provided that all judgments should be entered of record of the day of the month and year, whether in term or vacation, when signed, and should not have relation to any other day. Now, however, by Rules of the Supreme Court, 1883, Order XLI. rule 4, it is provided that in all cases not within rule 3 of that order (*i*), the entry of judgment shall be dated as of the day

(*b*) In former times inquisitions were quashed for a variety of technical defects usually of a trivial character, but modern legislation has rendered such objections immaterial. See 14 & 15 Vict. c. 100, ss. 24, 25, and 30; 24 & 25 Vict. c. 100, s. 6; and Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 20.

(*c*) 1 Saund. 363, note to *Toomes v. Etherington*, S. P. 6 B. & C. 627, by Lord Tenterden. The modern practice relating to applications by *certiorari* for the removal of inquisitions for the purpose of quashing them, the removal of inquisitions for trial, and the traverse of inquisitions is dealt with in Short & Mellor's Crown Practice, pp. 106–113.

(*d*) Co. Lit. 52, *b*; Tidd's Pract. 551, 9th edit. If the warrant be given to two or more, and one of them die, the survivor may obtain leave to enter up judgment at his suit: *Fendall v. May*, 2 M. & S. 76; 2 Chit. Arch. 14th edit. p. 1309.

(*e*) *Coles v. Haden*, Barnes, 44. As to the necessary affidavit of execution in such a case, see *Baldwin v. Thompson*, 2 Dowl. 591.

(*f*) *Henshall v. Matthew*, 7 Bingh. 337; *Foster v. Claggett*, 6 Dowl. 524.

(*g*) Tidd's Pract. 551, 9th edit.

(*h*) *Ibid.*

(*i*) See *ante*, p. 674.

on which the requisite documents are left with the proper officer for the purpose of entry, and the judgment shall take effect from that date. By Order LII. rule 13, every order takes effect from the day it is made.

When an executor may proceed on an arbitration commenced by testator.

The authority of an arbitrator is determined by the death of either party before award made: even where the submission is by order of *nisi prius*, and a verdict is taken for the plaintiff, subject to the award (*k*). But it is now usual to insert in the order of reference a clause providing, that in the case of the death of either of the parties before the making of the award, it shall be delivered to their personal representatives (*l*). And where such a clause is inserted in the order of *nisi prius* or rule of Court, or deed or other instrument under which the submission to arbitration is effected, an award made after the death of either party appears to be valid and available for or against the executors or administrators (*m*). This, however, must be understood as limited to an action in which the cause of action survives for or against the personal representatives of the deceased party. So where the parties to an action for a tort agreed before trial to refer the matter in dispute to an arbitrator, the order of reference containing a clause that the arbitrator should publish his award, "ready to be delivered to the parties in difference or such of them as require the same (or their respective personal representatives if either of the said parties die before the making of the award)," and, where after the hearing of the reference had been concluded, but before the award was made, the plaintiff died, it was held that the cause of action, being in tort, died with the plaintiff, and did not pass to his personal representatives by force of the clause above-mentioned, which in an action of tort was inoperative, and the executors who took up the

(*k*) *Potts v. Ward*, 1 Marsh. 366; *Toussaint v. Hartop*, 7 Taunt. 571; *Cooper v. Johnson*, 2 B. & A. 394; *Rhodes v. Haigh*, 2 Barn. & Cress. 345. But where an action would not abate by reason of the death of one party it seems probable that a reference of that action is not vacated by such death, but that the power of the arbitrator remains to bind the survivors though not the personal representatives of the deceased: *Edmunds v. Cox*, 2 Chitt. 432; 3 Dougl. 406. And see generally as to revocation by death of a party, Russell on Arbitrators, 9th edit. 121.

(*l*) See the observations of Abbott, C. J., in *Cooper v. Johnson*, 2 Barn. & Ald. 395.

(*m*) *Tyler v. Jones*, 3 B. & C. 144; *Clarke v. Crofts*, 4 Bingham. 143; *Macdougall v. Robertson*, 2 Y. & Jerv. 11; *Rogers v. Stanton*, 7 Taunt. 575 (*n*). But it cannot be enforced by attachment: *Newton v. Walker*, Willes, 315; 3 B. & C. 146.

award were not entitled to be substituted for their testator as plaintiff (*n*).

In an action where the cause of action survives for, and against, personal representatives, if either party dies *after* the award is made under an order of *nisi prius*, where a verdict has been taken, subject to the award, judgment may be entered notwithstanding the death, under the provisions of the Rules of the Supreme Court, 1883, Order XVII. rule 1. The power of the Court to order judgment to be entered *nunc pro tunc* has been already referred to (*o*).

The authority of an attorney in a cause is determined by the death of his client: consequently, if, after a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff dies, no cause can be shown against the rule until there is a personal representative (*p*): Cause cannot be shown on behalf of the attorney who claims a lien on the verdict for his costs (*q*). So where money is paid into Court by a defendant who dies before verdict or interlocutory judgment, if the suit abates, the money can be paid out of Court, only to the personal representative of the defendant; and an application on the part of his attorney will not be entertained (*r*).

The authority of an attorney in a cause is determined by the death of his client.

By sect. 47 (1) of the Conveyancing Act, 1881, it is provided that any person making or doing any payment or act, in good faith, in pursuance of a power of attorney shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act

Executor acting under power of attorney not to be liable by reason of the death of party giving such power: Conveyancing Act, 1881.

(*n*) *Bowker v. Evans*, 15 Q. B. D. 565. *Aliter* where the cause of action has been determined and the damages only are referred to an arbitrator for assessment: *Chapman v. Day*, 48 L. T. 907. See *Re Donovan and Burke*, [1908] 2 Ir. R. 143.

(*o*) *Ante*, p. 673.

(*p*) *Shoman v. Allen*, 1 Man. & Gr. 96, note (*c*). But where after a verdict for the defendant, he died, and then the plaintiff obtained a rule for a new trial calling on the "legal representatives of the defendant or their attorneys," to show cause, and it was served on the latter; it was held that cause might be shown by counsel instructed by the attorneys acting for the executors named in the Will, though they had not proved it; and the Court distinguished *Shoman v. Allen*, on the ground that in that case there was no person who could be served with the rule; in the present case there was: *Thomas v. Dunn*, 1 C. B. 139.

(*q*) *Shoman v. Allen*, 1 M. & Gr. 96, note (*c*).

(*r*) *Palmer v. Reiffenstein*, 1 Man. & Gr. 94.

known to the person making or doing the same. The section applies only to payments and acts made and done after the commencement of the Act.

Sub-sect. (2) provides that this section shall not affect any right against the payee of any person interested in any money so paid, and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

Sects. 8 and 9 of the Conveyancing Act, 1882, provide that powers of attorney created by instruments executed after the commencement of the Act shall, if given for valuable consideration and expressed to be irrevocable, continue unrevoked in favour of a purchaser, notwithstanding notice, by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor, and, even though not given for valuable consideration, shall, if expressed to be irrevocable for a fixed period not exceeding one year, continue unrevoked in favour of a purchaser, notwithstanding notice, by any of the above events, during that fixed time.

Trustee Act,
1893.

By sect. 23 of the Trustee Act, 1893, it is expressly enacted that a trustee (which term includes a personal representative by virtue of sect. 50 of the Act), acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying: Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

BOOK THE FOURTH.

THE ESTATE OF SEVERAL EXECUTORS OR ADMINISTRATORS, OF THE ESTATE OF AN EXECUTOR OF AN EXECUTOR, AND OF AN ADMINISTRATOR DE BONIS NON; AND OF THE ESTATE OF AN EXECUTRIX OR ADMINISTRATRIX WHO IS A FEME COVERT.

CHAPTER THE FIRST.

THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR CONSIDERED WHEN THERE ARE SEVERAL EXECUTORS OR ADMINISTRATORS.

IF there be several executors or administrators, they are regarded in the light of an individual person (*a*). They have a joint and entire interest in the effects of the testator or intestate, including chattels real (*b*), which is incapable of being divided; and in case of death such interest shall vest in the survivor (*c*), without any new grant by the Court (*d*). Consequently, if one of two executors or administrators grant or release his interest in the testator's or intestate's estate to the other, nothing shall pass; because each was possessed of the whole before (*e*). So, if one of several executors release but his part of the debt, it has been held that the whole is discharged (*f*).

Among several executors, &c., each hath the whole estate.

(*a*) 3 Bac. Abr. 30, tit. Exors. (D. 1).

(*b*) *Anon.* Dyer, 23, *b*; Com. Dig. Admon. (B. 12).

(*c*) See the judgment of Parke, B., in *Nation v. Tozer*, 1 Cr. Mees. & R. 174.

(*d*) *Ante*, p. 388. See *post*, Pt. III. Bk. I. Ch. II., as to the distinction taken by some authorities between executors and administrators.

(*e*) Godolph. Pt. 2, c. 16, s. 1.

(*f*) Godolph. Pt. 2, c. 16, s. 1. But if one executor of several alone sell goods of the testator, he alone may maintain an action for the price, not naming himself executor: Godolph. *ubi supra*; Wentw. Off. Ex. 224, 14th edit.; *Brassington v. Ault*, 2 Bingh. 177. So if

Again, if two men have a lease or term of years, as executors, and the one of them grant all his right and interest, and all that appertains to him by virtue of the lease, to A., the whole term of years passes; because every executor has an entire authority and interest; otherwise of other joint-tenants of a term (*g*). Therefore, if a lease of a thousand acres of land comes to two executors, no partition or division can be made between them, as between joint lessees of land, where each hath but a moiety in interest, though possession of and throughout the whole: but among executors each hath the whole; and, therefore, if he grants his part he grants the whole (*h*). Yet one executor may demise or grant the moiety of the land for the whole term, and so may the other: And by this means they may settle a moiety for each in some third person intrusted for them (*i*).

In pursuance of the above principle, it was held that where two out of three executors granted a lease of part of their testator's property, the whole passed to the lessee, and the two executors alone could maintain ejectment against him without joining the third (*k*).

Since several executors have a joint and entire interest in all the goods of their testator, including chattels real, it follows that the act of one, in possessing himself of the effects, is the act of the others, so as to entitle them to a joint interest in possession, and a joint right of action, if they are afterwards taken away (*l*).

Several executors cannot sue on a promise made jointly with one of them:

Again, since several executors or administrators have a joint and entire interest in the estate in action of the deceased, it follows, that they cannot maintain an action at law in right of the deceased, upon a contract made by the defendant jointly with one of themselves (*m*). Therefore, to an action of assumpsit

goods be taken out of the possession of one of several executors: *Godolphin & Wentworth, ubi supra*. And, generally, if one executor alone contracts on his own account, he *must* sue alone on such contract, notwithstanding the money recovered will be assets: *Heath v. Chilton*, 12 M. & W. 632; *ante*, p. 660.

(*g*) *Anon.*; *Dyer*, 23, *b*.

(*h*) *Dyer*, 23, *b. in margine*; *Godolph.* Pt. 2, c. 16, s. 2.

(*i*) *Godolph.* Pt. 2, c. 16, s. 2.

(*k*) *Doe v. Wheeler*, 15 M. & W. 623.

(*l*) *Nation v. Tozer*, 1 Cr. Mees. & R. 174; 4 Tyrwh. 563, by Parke, B. But see note (*f*), *supra*.

(*m*) *Godolph.* Pt. 12, c. 6, s. 2; ——— *v. Adams*, 1 Younge, 117. See *post*, Pt. III. Bk. I. Ch. II., as to executors all joining in bringing actions; and see also Pt. III. Bk. III. Ch. II. § IX. 2, as to the effect of appointing a debtor to be executor at common law and in equity.

by several executors, it was held a good plea in bar, that the promises were made by the defendant jointly with one of the plaintiffs: And Mr. Justice Buller said, "the promise was made jointly with one of the plaintiffs: How can he sue himself in a Court of Law? It is impossible to say a man can sue himself" (n).

With respect to the power of one of several executors or administrators over the estate of the deceased, that subject will be more conveniently further discussed hereafter together with the power of executors and administrators generally (o).

Power of one of several executors, &c. over the estate.

(n) *Moffat v. Van Millengen*, 2 Bos. & Pull. 124, note (c); *Fitzgerald v. Boehm*, 6 B. Moore, 332. As to bringing the action by the surviving executors after the death of that executor who was a co-contractor with the defendant, see *Rose v. Poulton*, 2 B. & Adol. 822, explained in *Ellis v. Kerr*, [1910] 1 Ch. 529.

(o) *Post*, Pt. III. Bk. I. Ch. II.

CHAPTER THE SECOND.

THE ESTATE OF AN EXECUTOR OF AN EXECUTOR, OR OF AN ADMINISTRATOR DE BONIS NON; AND OF THE ESTATE OF A FEME COVERT EXECUTRIX OR ADMINISTRATRIX.

Executor of
executor.

AN executor of an executor, in however remote a series, has the same interest in the effects of the first testator as the first and immediate executor (*a*). With respect, indeed, to *choses in action*, it would seem to have been established, at common law, that an executor of an executor could not bring actions in respect of the original testator (*b*). But by stat. 25 Edw. III. st. 5, c. 5, it is enacted, that executors of executors shall have actions of debts, accompts, and of goods carried away of the first testators. An executor of an executor is within the equity of the statute of 32 Hen. VIII. c. 37, with respect to remedies for rent arrear in certain cases (*c*), and conversely, by stat. 4 Will. & M. c. 24, the executor of an executor who wasted his testator's estate was rendered chargeable in the same manner as the testator might have been.

Administra-
tor *de bonis*
non.

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, &c., which remain in specie, and were not administered by the first executor or administrator (*d*). Also it is holden that if an

(*a*) Wentw. Off. Ex. c. 20, p. 462, 463, 14th edit.; Com. Dig. Administration (G.).

(*b*) Wentw. Off. Ex. c. 20, p. 461, 14th edit. It is difficult to see on what principle this doctrine rested; especially as it was held at common law, that execution might be sued out on a judgment or statute by an executor of an executor: *Ibid*.

(*c*) Wentw. Off. Ex. c. 20, p. 462, 14th edit.; *post*, p. 690.

(*d*) *Wankford v. Wankford*, 1 Salk. 306, by Lord Holt; Bac. Abr. Executors (B. 2), 2. L. was possessed of furniture and other property, and on his death, intestate, in 1827, the furniture was removed by his widow to another house, in which she resided, until her death in 1832, with her daughter E., and continued during that period to use the furniture: In October, 1829, the widow caused the furniture to be valued, in order to her taking out administration to L., which she afterwards did: In 1838, the furniture was sold by the defendant (who

executor receives money in right of his testator, and lays it up by itself, and dies intestate, this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects as goods in specie(*e*). And wherever assets are in the hands of a third person, at the death of an administrator, or executor intestate, the administrator *de bonis non* may sue for their recovery (*f*).

There is such a privity of estate between the former executor or administrator, and the administrator *de bonis non*, that, in *assumpsit* brought by the administrator *de bonis non*, the promise may be laid to have been made to the former executor or administrator (*g*). So if a former administrator enters into an agreement for the sale of a lease of a chattel interest belonging to the intestate, and dies before the agreement is completed, the administrator *de bonis non* stands in such privity of estate that he will be compelled to carry the agreement into execution (*h*).

If the original executor or administrator has fraudulently alienated the assets for his own use in collusion with the vendee(*i*), such assets will be considered, in equity, as unadministered, and will consequently pass as such to the administrator *de bonis non*; who in that character may apply to the Court of Equity to have the sale set aside, and to have the legal estate conveyed to him. Thus where a testatrix having directed that a leasehold should be sold, and the money divided among five persons, the administrator with the Will annexed, alleging that he had become entitled to it by an agreement with the legatees, assigned it over for valuable consideration: And it was holden, that, at his death, it remained assets unadministered: and that the purchaser must be directed to convey it to the administratrix *de bonis non*, though the persons beneficially interested were not all parties to the suit (*k*). It must, however, be observed, that if the administrator, in his character of administrator, had sold the

had married another daughter of L.), with E.'s concurrence: In 1840 (disputes having arisen about the distribution of the proceeds), E. took out administration to her mother: It was held, that E. could not maintain trover for the furniture without having taken out administration *de bonis non* to L.: *Elliott v. Kemp*, 7 M. & W. 306.

(*e*) *Wankford v. Wankford*, 1 Salk. 306; Bac. Abr. Executors (B. 2), 2.

(*f*) *Langford v. Mahony*, 4 Dr. & Warr. 81, 107.

(*g*) *Hirst v. Smith*, 7 T. R. 182; *Moseley v. Rendell*, L. R. 6 Q. B. 338. See *ante*, p. 660.

(*h*) *Hirst v. Smith*, 7 T. R. 182, 183, by Lord Kenyon.

(*i*) See *post*, p. 697 *et seq.*

(*k*) *Cubbridge v. Boatwright*, 1 Russ. Chan. Cas. 549.

property, and the purchaser had been ignorant of the real nature of the transaction, the sale could not have been set aside (*l*).

If by some of the means specified in an earlier part of this Work (*m*), the property in any of the effects of the deceased has been changed by the original executor or administrator, and has vested in him in his individual capacity, such effects will go to his own administrator or executor, and not to the administrator *de bonis non*. Thus, in *Drue v. Baylie* (*n*), an administrator made an underlease of the intestate's term of years, reserving rent to himself, his executors, &c., with a covenant to pay the rent, and died: and it was holden, that his executor, and not the administrator *de bonis non*, should have the rent. So in *Skeffington v. Whitehurst* (*o*), it was holden by Alderson, B., that upon the death of an administrator, who has mortgaged the leasehold estate of his intestate, reserving the power of redemption to himself, his executors, administrators, and assigns, the equity of redemption vests in the personal representative of the administrator, and not in the administrator *de bonis non* of the intestate. But on appeal to the House of Lords from this decision, although it was affirmed on other grounds, Lords Cottenham, Brougham, and Campbell, did not concur with the view which the learned Baron had thus taken of the case (*p*): for although no action at law could be brought on the mortgage deed, except in the name of the personal representative of the administrator, yet when it is clear that he has no claim on the estate, and that the administrator *de bonis non* is the person to whom a reconveyance must ultimately be executed, there seems no reason why the latter should not be allowed to file a bill against the mortgagee to redeem (*q*).

(*l*) See *post*, p. 696 *et seq.*

(*m*) *Ante*, p. 491.

(*n*) 1 Freem. 462.

(*o*) 3 Younge & Coll. 1.

(*p*) *Skeffington v. Budd*, 9 Cl. & F. 220, 248.

(*q*) The decision of Lord Nottingham in *Butler v. Bernard*, 2 Freem. 139, was considered by Alderson, B., as one which governed the case before him. But in the House of Lords it was observed by Lord Campbell, that in *Butler v. Bernard* it seems to have been taken that the representative of the administrator had some claim on the estate, so that when a reconveyance had been executed to him, he would not have been accountable to the administrator *de bonis non*; and Lord Nottingham intimated no opinion that a bill to redeem may not be maintained by the administrator *de bonis non*, where the representative of the administrator, after the estate had been reconveyed to him, might himself be called on to convey to the administrator *de bonis non*.

Again, the administrator *de bonis non* is entitled to all debts due and owing to the original testator or intestate; but in this instance also, the original executor or administrator may, in some cases, have so altered the property in a *chose in action*, as to transmit it to his own personal representative, and not to the administrator *de bonis non*. Thus, where A. died intestate, and his son took out administration to him, and received part of a debt, being rent arrear to the intestate, and accepted a promissory note for the residue, and then died intestate; it was held that this acceptance of the note was such an alteration in the property as vested it in the son, and, therefore, on his death, it should go to his administrator, and not to the administrator *de bonis non* (r).

But it would seem from the case of *Catherwood v. Chabaud* (s), that where the substituted cause of action is such that the first executor or administrator may sue in his representative character, the right of action devolves upon the administrator *de bonis non* of the original deceased: for he succeeds to all the legal rights which belonged to the first executor or administrator in his representative capacity (t). Therefore where a bill of exchange was endorsed generally, but delivered to S. C., as administratrix of I. C., for a debt due to the intestate, and S. C. died before the bill became due and before it was paid; it was held that the administrator *de bonis non* of I. C. might sue upon the bill (u). In such cases it does not follow, because the administrator *de bonis non* may sue, that the representative of the original executor or administrator may not sue: there may be instances where the latter might and ought to sue: *e.g.*, if the first administrator or executor has made himself a debtor to the estate of the original deceased for the amount of a bill received in payment of a debt due to that estate (x).

With respect to enforcing judgments obtained by the original executor or administrator, the rights of the administrator *de bonis non* which were formerly governed by 17 Car. II. c. 8, s. 2 (now repealed), would seem now to be governed by Rules of the Supreme Court, Ord. XLII. r. 23.

If the original executor or administrator, in his own name,

(r) *Barker v. Talcot*, 1 Vern. 433; Bac. Abr. Executors (B. 2), 2.

(s) 1 Barn. & Cress. 150.

(t) See *ante*, p. 660.

(u) *Catherwood v. Chabaud*, 1 Barn. & Cress. 150.

(x) *Ibid.* 156, per Lord Tenterden.

brings trespass for goods taken out of his possession, which were the testator's or intestate's, and dies, his own executor or administrator must take execution of the judgment; but in the case of an executor of an executor, he shall hold the proceeds of the execution as assets of the first testator, and in the case of an executor or administrator of an original administrator, or of an administrator of an original intestate executor, he shall be compelled in equity to pay them to the administrator *de bonis non* (y).

Of the estate
of an execu-
trix who is a
feme covert.

Although marriage was, before the passing of the Married Women's Property Act, 1882, an absolute unqualified gift by the wife to the husband of all the goods and personal chattels which she was possessed of at that time, or became so afterwards *in her own right*, yet the marriage made no gift to him of the goods and chattels which belonged to his wife *in autre droit* as executrix or administratrix: because such a gift might prove disadvantageous to the creditors, &c., of the testator or intestate: besides, since the wife took no beneficial interest in the property, there was none which the law could transfer to her husband (z).

Since the commencement of the Married Women's Property Act, 1882 (*i.e.*, 1 Jan. 1883), a married woman is, by virtue of the provisions of sect. 1 (2), capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any "contract . . . in all respects as if she were a *feme sole*" (a).

By sect. 24 of the Act it is provided that the word "contract" in the Act shall include the acceptance of any trust, or the office of executrix or administratrix, and that the husband of an executrix or administratrix shall not be subject to any liabilities incurred by his wife by reason of any breach of trust or *devastavit* committed by her as executrix or administratrix, either before or after her marriage, unless he has acted or intermeddled in the trust or administration. The Act, however, did not enable a woman married since the commencement of the Act, being a trustee of real estate, to convey, except with the concurrence of her husband and by deed acknowledged (c). But

(y) *Yaates v. Gough*, Yelv. 33.

(z) Co. Lit. 351; *Thompson v. Pinchell*, 11 Mod. 178; 1 Roper, Husband & Wife, 187, 2nd edit.

(a) See *post*, p. 724 *et seq.*

(c) *Re Harkness and Allsopp*, [1896] 2 Ch. 358.

now by the Married Women's Property Act, 1907 (*d*), a married woman is able without her husband to dispose of or join in disposing of real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*. The Act operates to render valid and confirm all such dispositions made after December 31, 1882, and before the commencement of the Act.

By stat. 21 & 22 Vict. c. 108, s. 7, it is enacted, that "the provision of this Act, and in the stat. 20 & 21 Vict. c. 85, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or *shall* become entitled as executrix, administratrix, or trustee, since the sentence of separation, or the commencement of the desertion (as the case may be), and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix" (*e*).

As to the wife's power over her estate as executrix, it will be proper to consider the question hereafter (*f*), together with the subject of the power of a *feme covert* executrix or administratrix generally.

(*d*) 7 Edw. VII. c. 18, s. 1.

(*e*) As to estate vested in a married woman as executrix, after a protection order under the Divorce Act, but prior to the passing of this statute, see *Bathe v. Bank of England*, 4 K. & J. 564.

(*f*) Pt. III. Bk. I. Ch. IV.

21 & 22 Vict.
c. 108.

The wife's
power over
her estate as
executrix.

PART THE THIRD.

THE POWERS AND DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

THE POWER AND AUTHORITY OF AN EXECUTOR OR ADMINISTRATOR.

CHAPTER THE FIRST.

THE POWER AND AUTHORITY OF AN EXECUTOR OR ADMINISTRATOR GENERALLY.

AFTER the administration is granted, the power of an administrator is equal to and with the power of an executor (a).

Power of executor or administrator to bring actions.

It has already appeared in the course of the inquiry into the quality and quantity of the estate of an executor or administrator, that, as an executor or administrator has the same property in the personal effects as the deceased had when living, so he has the same power to bring actions to recover them (b).

(a) Touchst. 474.

(b) *Ante*, p. 606 *et seq.* In *Cobbett v. Clutton*, 2 C. & P. 471, a relation of the defendants had in his possession a box containing papers belonging to the deceased: The box, with its contents, was sent by him to the office of the defendants, who were solicitors, to be delivered to the plaintiff, as executor, on his giving a schedule of the deeds contained in the box: The plaintiff demanded the box and its contents from the defendants, but they refused to deliver it up, unless the plaintiff would give them a schedule of its contents: And Lord Tenterden held that the defendants had no right to insist on the inventory, before they gave up the box: that the plaintiff, as

It is clear that an executor *de son tort* cannot bring any action in right of the deceased (*c*).

Prior to the Land Transfer Act, 1897, within a convenient time after the testator's death, or the grant of administration, the executor or administrator had a right to enter the house descended to the heir, in order to remove the goods of the deceased (*d*); provided he did so without violence; as, if the door were open, or at least the key were in the door; and, although the door of entrance into the hall and parlour were open, he could not therefore justify forcing the door of any chamber, to take the goods contained in it; but was empowered to take those only which were in such rooms as were unlocked, or in the door of which he should find the key (*e*). He had also a right to take deeds and other writings relative to the personal estate out of a chest in the house if it were unlocked, or the key were in it; but he had no right to break open even a chest. If he could not take possession of the effects without force, he must desist, and resort to his action (*f*). On the other hand, if the executor or administrator, on his part, were remiss in removing the goods within a reasonable time, the heir might distrain them as *damage feasant* (*g*).

By sect. 1 of the Land Transfer Act, 1897 (*h*), however, the real estate of a testator dying after the commencement of the Act (except certain copyholds and customary freeholds) vests in the legal personal representative.

Where a lessee for years underlets the land and dies, his personal representative may distrain, at common law, for the arrears of rent which became due in the lifetime of the deceased: because these arrears were never severed from the reversion, but the executor or administrator has the reversion, and the rent

executor, was entitled to the possession of the papers of the deceased; and that, being so, he was entitled to bring an action of trover, on the defendants' refusal to give them up.

(*c*) Bro. Abr. Administration 8. It should, however, be observed, that an executor *de son tort*, being in possession of goods of the deceased, had sufficient title to maintain an action for taking them away, or injuring them, against a mere wrongdoer. See *ante*, p. 217.

(*d*) Wentw. Off. Ex. 202, 14th edit.

(*e*) *Ibid.*; Toller, 255.

(*f*) Wentw. Off. Ex. 81, 202, 14th edit.

(*g*) Wentw. Off. Ex. 202, 14th edit.; Plowd. 280, 281; *Stodden v. Harvey*, Cro. Jac. 204.

(*h*) See *ante*, p. 494.

annexed thereto, in the same plight as the deceased himself had it (i).

Similarly since the passing of the Land Transfer Act, 1897, inasmuch as real estate within the operation of the Act vests in the legal personal representative, the executor or administrator has the reversion and the rent annexed thereto.

At common law, the executors or administrators of a man seised of a rent-service, rent-charge, rent-seek, or fee-farm, in fee-simple, or fee-tail, or for his own life or *pur autre vie*, could not distrain for the arrears incurred in the lifetime of the testator or intestate (k). To remedy this, the statute 32 Hen. VIII. c. 37, was passed, which enacts that it shall be lawful to every executor and administrator of any person or persons unto whom rent or fee-farm is or shall be due, and not paid at the time of his death, to *distrain* for the arrearages of all such rents or fee-farms, upon the lands, tenements, and other hereditaments which were charged with the payment of such rents or fee-farms, and chargeable to the distress of the said testator, so long as the said lands, tenements or hereditaments continue, remain and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee-farm so being behind, to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid.

And by sect. 4, tenants *pur autre vie*, their executors or administrators, may sue or distrain for arrears due during the life, and unpaid after the death, of the *cestui que vie* in like manner as at common law they might have done during his life.

The statute applies only to cases in which the owner of the rent, if he had lived, might have distrained; and therefore, if the rent be in arrear, and the owner grants away his interest and dies, his executors or administrators shall have no remedy for these arrearages (l).

The statute gives the power of distress upon the lands out of

(i) *Wade v. Marsh*, 1 Roll. Abr. 672, tit. Distress (O.) 13; *S. C.*, Latch. 211.

(k) *Co. Lit.* 162, a.

(l) *Co. Lit.* 162, b; *Oguel's Case*, 4 *Co.* 50, b.

Also by 32 Hen. VIII. c. 37, executors, &c., may distrain for rent, due to their testator, &c., in his lifetime, issuing out of freehold lands.

Power of executors of tenants *pur autre vie* to distrain.

which the rent is reserved, so long as they continue in the hands of him from whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent, *ad infinitum* (*m*): But they cannot be distrained upon for such rent, if they be in the hands of one claiming paramount to him; and therefore, if the lord enter upon the grantor for an escheat, the land shall not be distrained upon for arrears of rent (*n*). So where a man makes a lease for life, rendering rent, remainder for life, remainder in fee, and after the accruing of rent from the first tenant for life, the lord dies and then the tenant for life dies, the executors cannot distrain upon the remainderman; because he claims not by or from the tenant for life (*o*). And if tenant in tail grant a rent for life, and die, the executor of the grantee cannot distrain upon the issue in tail, who comes in under the original gift in tail, and not under the grantor of the rent (*p*). But if a man grant a rent-charge to A. for the life of B., and lets the land to C. for life, the remainder to D. in fee, the rent is in arrear for many years, B. dies, and afterwards C. dies: A. may distrain D. in remainder for all the arrears, by the statute (*q*).

All manner of arrears of rent issuing out of a freehold or inheritance, whether they be in money, or in corn, cattle, fowls, pepper, spurs, gloves, or any other profit to be delivered, are within the statute, and that whether they be annual, or every two, three or four years: But work-days, or any corporal service or the like, are not within it (*r*): Neither are arrears of a *nomine pœnæ* (*s*).

It has been holden that rents issuing out of freehold lands are alone within the statute; consequently that it does not extend to enable executors or administrators to distrain for the arrears of rents issuing out of copyhold (*t*). It should also be observed

Query, whether the statute extends to copyholds.

(*m*) Co. Lit. 162, *b*; *Oguel's Case*, 4 Co. 50, *b*.

(*n*) Co. Lit. 162, *b*.

(*o*) Co. Lit. 162, *b*.

(*p*) *Lambert v. Austin*, Cro. Eliz. 333; *Lord Fairfax v. Lord Derby*, 2 Vern. 612.

(*q*) Co. Lit. 162, *b*; *Edrich's Case*, 5 Co. 118.

(*r*) Co. Lit. 162, *b*.

(*s*) *Ibid*.

(*t*) *Appleton v. Doily*, Yelv. 135; Bull. N. P. 57. But in Gilb. Ten. 186, 187, 188, there is the following passage: "In the supplement to my Lord Coke's Treatise of Copyholds (s. 21, Tracts, 216), it is said that the 32 Hen. VIII. c. 8, concerning remedies for arrears of rent, extends not to copyholds. To prove which, a case is cited in 2 Leon. 109. . . . This opinion, as it seems, was upon the first hearing of

that sect. 1 of the Land Transfer Act, 1897, which vests the real estate in the legal personal representative, excepts from the definition of real estate given in sub-sect. 4 "land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant."

Distress by
executor of
lessor who has
leased for a
term or at
will:

If a man makes a lease for life or lives, or a gift in tail, reserving a rent, this is a rent-service within the statute of Hen. VIII.(u). But whether if a person seised in fee of land demised it for years, reserving rent, his executor or administrator could, under this statute, distrain for arrears of rent incurred in his lifetime, was a question which had been much discussed, and was not settled until the cases of *Prescott v. Boucher* (x) and *Jones v. Jones* (y), which decided the point in the negative; on the ground that the deceased was not tenant in fee simple, or indeed tenant at all, *of the rent*.

But by statute 3 & 4 Will. IV. c. 42, s. 37, it was enacted, "that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime in like manner as such lessor or landlord might have done in his lifetime."

By sect. 38, it is further enacted, "that such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or the cause; for the very case is reported quite contrary by the same reporter, 2 Leon. 152; 3 Leon. 59; Moor. 812; and it is said to be resolved by all the judges but Fenner, that the copyhold should be charged with the rent-charge; for the custom is no part of his title, but only appoints how he shall hold: and since it was charged in the lord's hands, it is plainly within the intent and meaning of the Act, as well as the words, to be charged in the copyholder's hands; and to this purpose there is a case in Dyer, 270, b, adjudged. But if the case were adjudged, that the lands should not be charged in the copyholder's hands on that reason, that he doth not claim only by and from, &c., but by custom, yet that would never warrant so general a conclusion, that the statute in no other part should extend to copyholds, and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors should not have debt or distrain. But turn the tables, and if the Act of Parliament doth in point extend to copyholds, as lands that are claimed by, &c., and that which in this case only doth make a doubt, is overruled, then this is a strong argument, that in other cases, where that is not which occasioned the doubt, the statute shall extend to copyholds, especially since the Act was made to remedy an apparent wrong, and doth no harm either to lord or tenant."

(u) Co. Lit. 162, b.

(x) 3 B. & Ad. 849.

(y) *Ibid.* 967.

3 & 4 Will.
IV. c. 42,
s. 37.

lease had not been ended or determined, provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid" (z).

The Land Transfer Act, 1897, however, would seem now to supersede this statute where the arrears are no longer severed from the reversion, but both vest in the legal personal representative.

Several executors or administrators may all join in distraining, or any one may distrain alone, for the whole rent due, for they are regarded in the light of an individual person (a).

Executors may join in distraining or one of several executors may distrain alone. Executor of administrator who has underlet.

If an administrator makes an underlease of a term of years of the deceased, reserving rent to himself, his executors, &c., it has been held that his executors, and not the administrators *de bonis non*, shall have the rent: but it would seem that they cannot distrain for it (b), because the reversion belongs to the administrator *de bonis non*; and a reversion is necessary to found the remedy by distress (c).

It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors (d), much less by legatees, either general or specific, into the hands of the alienee (e). The

The executor has an absolute power over the whole personal estate: the assets cannot be followed into the

(z) The Agricultural Holdings Act, 1908, imposes certain restrictions on the right of distress in the case of holdings to which the Act applies.

(a) 3 Bac. Abr. 30, tit. Exors. (D. 1).

(b) *Drue v. Baylie*, 1 Freem. (K. B.), 392, 403. See *ante*, p. 684.

(c) See *Burne v. Richardson*, 4 Taunt. 720; *Lewis v. Baker*, [1905] 1 Ch. 46.

(d) Nor can they be followed by one who has paid off a debt of the testator's, or who has made advances to the executor to enable him to do so: *Haynes v. Forshaw*, 11 Hare, 93. It is plain that a creditor has no specific right against the leaseholds, or against any other chattel of the deceased debtor of which the executor may have taken possession. He has a right to sue the executor and to obtain a decree against him. But it is doubtful whether upon a common decree for an account any right would attach upon the leaseholds or upon any specific chattels, unless the decree also directed a sale of such leaseholds or chattels: *per Wood, V.-C.*, in *Simpson v. Morley*, 2 Kay & J. 71, 75, 76.

(e) *Whale v. Booth*, 4 T. R. 625, note to *Farr v. Newman*; *Nugent v. Gifford*, 1 Atk. 463. See also *Spackman v. Timbrell*, 8 Sim. 260,

hands of his
alienee:

principle is, that the executor or administrator, in many instances, *must* sell, in order to perform his duty in paying debts, &c.: and no one would deal with an executor or administrator, if liable afterwards to be called to account (*f*). And now by sect. 1 of the Land Transfer Act, 1897, the real estate, as defined by the Act, of a testator or intestate dying after the commencement of the Act, in like manner devolves to and becomes vested in his personal representatives as if it were a chattel real. And by sect. 2 (3) of the same Act, in the administration of the assets of such deceased person his real estate is to be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate. His executor therefore has absolute power to sell real estate for the purpose of paying the debts of the testator, and can sell it in lots or can sell the surface and minerals separately (*g*).

even specific
legacies:

The power of the executors to dispose of a chattel specifically bequeathed seems to have been formerly questioned (*h*); but succeeding cases in modern times have established it beyond dispute (*i*). So now, since the Land Transfer Act, 1897, the

where a testator bequeathed leaseholds to his son, and appointed him and another person his executors: Three years after the testator's death, the son settled the leaseholds, on his marriage: And Sir L. Shadwell, V.-C., held that as against the son's wife and children, the property was not liable to the testator's creditors. See also *Dilkes v. Broadmead*, 2 De G. F. & J. 566, accord. So where an executrix, after probate and after judgment recovered against her for a debt due from her testator, assigned all his property and effects to trustees for the benefit of his creditors, the assignment was held valid as against the judgment creditor: *Wolverhampton Bank v. Marston*, 7 H. & N. 148.

(*f*) By Lord Mansfield in *Whale v. Booth*. So if a temporary executor or administrator has sold the goods there is no remedy against the vendees: *Chandler v. Thompson*, Hob. 266: unless the transaction be fraudulent, as where an administrator *durante minore ætate* sold East India stock, and the buyer had full notice that it was the stock of the infant: *Munn v. Dunkin*, Finch. R. 298. See *post*, pp. 697, 698.

(*g*) *Re Cavendish and Arnold*, [1912] W. N. 83.

(*h*) *Humble v. Bill*, 2 Vern. 444.

(*i*) *Ever v. Corbet*, 2 P. Wms. 149; *Burting v. Stonard*, *ibid.* 150; *Langley v. Lord Oxford*, Ambl. 17. Lord St. Leonards, in his Treatise on Vendors and Purchasers (vol. ii. p. 56, 9th edit.), considers it doubtful whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest: and he cites *Tomlinson v. Smith*, Finch. 378. But that was a case of gross fraud; and it seems that if a purchaser or mortgagee shall *bonâ fide* deal with an executor, within a reasonable time after the testator's death, and obtain possession of the muniments of title, a specific legatee would never be permitted, at law or in equity, to set up the executor's

legal personal representative has power to dispose of specifically devised real estate (*k*).

As an executor may absolutely dispose of the testator's assets for the general purposes of the Will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the Will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets (*l*). And, accordingly, the power of an executor or administrator to mortgage the assets has been recognized by high authorities on several occasions (*m*). The mortgage may be either of legal or equitable assets (*n*), or of mere *choses in action* (*o*), and may be by actual assignment, or by deposit (*p*), and it may properly give the mortgagee a power of sale (*q*). So, the executor may pledge a part of the assets for the purpose of better enabling him to administer the estate; and it would seem that the pledgee may sell the things pledged, if they are not redeemed within the proper time (*r*). Although after an administration decree an executor cannot safely exercise any power without the sanction of the Court (*s*), it would seem that the power to mortgage the assets is not taken away by a decree for administration, where no receiver has been appointed and no injunction granted (*t*).

the executor
may mortgage
the assets:

assent against the sale or mortgage; for by sale and delivery, the title of the purchaser or mortgagee is complete. However, the general rule certainly is that, at law, the title to any specific thing bequeathed vests, upon the assent of the executor, absolutely in the legatee, so as to enable him to bring an action of ejectment for a chattel leasehold, or trover for the goods which are the subject of the legacy. (See *Doe v. Guy*, 3 East, 120; *Williams v. Lee*, 3 Atk. 223; and *post*, p. 1106.) And even in equity, if the legatee, after the assent, were to assign to a *bonâ fide* purchaser, the title of such an assignee would, it would seem, be better than that of any subsequent purchaser from the executors. See *post*, Pt. III. Bk. III. Ch. IV. § III.

(*k*) See Land Transfer Act, 1897, s. 2 (2) and (3), and Conveyancing Act, 1911, s. 12.

(*l*) Coote on Mortg. 8th edit. 405.

(*m*) By Lord Hardwicke in *Mead v. Orrery*, 3 Atk. 239; by Lord Thurlow in *Scott v. Tyler*, 2 Dick. 725; and by Lord Eldon in *M'Leod v. Drummond*, 17 Ves. 154; *Child v. Thorley*, 16 C. D. 151; *Re O'Donnell*, [1905] 1 Ir. R. 406 (sub-mortgage).

(*n*) *Nugent v. Gifford*, 1 Atk. 463; *Graham v. Drummond*, [1896] 1 Ch. 968. In both these cases the executor was also residuary legatee. See also Coote on Mortg. 8th edit. 410.

(*o*) *Scott v. Tyler*, 2 Dick. 724; *Vane v. Rigden*, L. R. 5 Ch. 667.

(*p*) *Ibid.*; Coote on Mortg. 8th edit. 410.

(*q*) *Russell v. Plaice*, 18 Beav. 21.

(*r*) *Russell v. Plaice*, 18 Beav. 28, 29.

(*s*) *Bethell v. Abraham*, L. R. 17 Eq. 24.

(*t*) *Berry v. Gibbons*, L. R. 8 Ch. 747; *Halley v. O'Brien*, [1920] 1 Ir. R. 149.

The effect of the provisions of the Land Transfer Act, 1897, above referred to, is to extend this power to mortgage to the real estate which by that Act is now vested in the personal representatives in the case of testators dying after the commencement of the Act; and the power can now be exercised by the proving executors alone without the consent of the Court (*u*).

a purchaser from an executor is not bound to see to the application of the purchase-money :

Again, it is not incumbent on the purchaser or mortgagee of the assets to see the money properly applied, although he knew he was dealing with an executor (*x*). "It is of great consequence," said Lord Thurlow, in *Scott v. Tyler* (*y*), "that no rule should be laid down here which may impede executors in their administration, or render their disposition of the testator's

(*u*) 1 & 2 Geo. V. c. 37, s. 12.

(*x*) *M'Leod v. Drummond*, 17 Ves. 154. Although an executor or administrator, purporting to act as such, will generally confer a good title upon an alienee to whom he conveys or transfers a legal estate or title, and the alienee has no obligation to see the consideration money properly applied, yet as the executor or administrator has no right to raise money for his own purposes or otherwise than for the purpose of the performance of the duties of administration, so a mortgage for purposes foreign to the administration will be set aside as against a mortgagee who has notice of the purpose for which the money is raised: *Ricketts v. Lewis*, 20 C. D. 745. In the argument in *Re Morgan*, 18 C. D. 93, Fry, J., put three possible cases—(i) An executor as executor borrows money ostensibly for executorship purposes on the security of the testator's assets; that is a valid transaction (*Berry v. Gibbons*, L. R. 8 Ch. 747); (ii) A man, known to be an executor, borrows on the security of the assets admittedly for his own private purposes; that is invalid (*Wilson v. Moore*, 1 M. & K. 337); (iii) An executor, not known to be such, borrows money for his own private purposes on the security of that which appears to be his own property but which is really the testator's property. This last was the case before Fry, J., and he held that the transaction was invalid, and his decision was confirmed by the Court of Appeal, but the mortgage was an equitable mortgage only by deposit. The conflict here, it is to be noted, was between two equitable titles, of which that of the estate was prior to that of the mortgagee; but Jessel, M. R., at p. 103, implies that if the mortgagee had got the legal title, being a purchaser without notice, this title would have prevailed.

Where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shows the contrary; and further, the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity: *per Stirling, J.*, in *Re Venn and Furze's Contract*, [1894] 2 Ch. 101, 114. But if an executor, not purporting to act as executor, contracts with a purchaser who does not know that he is executor, the purchaser cannot for the purpose of supporting the contract rely on the fact that he was an executor. Moreover, executors by assenting may become trustees, and are then precluded from making title as executors: *Solomon v. Attenborough*, [1912] 1 Ch. 451; [1913] A. C. 76.

(*y*) 2 Dick. 725.

effects unsafe or uncertain to a purchaser: His title is complete by sale and delivery: *what becomes of the price is of no concern to him*. This observation applies equally to mortgages or pledges, and even to the present instances where assignable bonds were merely pledged without assignment."

In the case of a legal transfer exceptions to the general power of the executor or administrator to dispose of the estate of the testator or intestate will be found in those cases only where *collusion* exists between the purchaser, or mortgagee, and the personal representative. That an executor may waste the money is not alone sufficient to invalidate the sale or mortgage; it must further appear that the purchaser or mortgagee participated in the *devastavit*, or breach of duty in the executor (*z*). exception where there is collusion between the purchaser and the executor :

Fraud and covin will vitiate any transaction, and turn it to a mere colour. If, therefore, a man concert with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue (*a*), or by applying the real value to the purchase of other subjects, for his own behoof, *or in any other manner*, contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (*b*).

Thus, where the person to whom the executor collusively passes the property knows that the executor is acting in violation of his trust, and in fraud of the persons interested in the due administration of the assets, the fraud vitiates the transaction, and the attempt to transfer the property is ineffectual and void (*c*).

Moreover, if a mortgagee or pledgee has actual notice that there are no debts and no reason is suggested for the mortgage, he will not be safe in lending (*d*). It is sufficient, however, if the mortgage is expressed to be made for the payment of legacies only (*e*).

(*z*) *Whale v. Booth*, 4 T. R. 625, note.

(*a*) Thus, a sale by an administrator to his brother and co-partner was set aside, it appearing to the Court, from the evidence, that the sale was made at an undervalue so gross, that it ought to be deemed fraudulent and void: *Rice v. Gordon*, 11 Beav. 265.

(*b*) By Lord Thurlow in *Scott v. Tyler*, 2 Dick. 725. See also the stat. 43 Eliz. c. 8 (*ante*, p. 179), as to treating the collusive purchaser as an executor *de son tort*.

(*c*) *Doe v. Fallows*, 2 Crompt. & Jerv. 481; 2 Tyrw. 462.

(*d*) *Re Verrell*, [1903] 1 Ch. 65.

(*e*) *Re Henson*, [1908] 2 Ch. 356.

whether a sale
in satisfaction
of an execu-
tor's private
debt be valid:

Formerly at law (*f*), it was laid down, that the executor might make a valid sale of the effects in satisfaction of his own private debt, although the purchaser knew the goods sold were the goods of the testator or intestate (*g*). But in equity it seems to be established, that, generally speaking, the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of his own debt: on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty (*h*).

If an executor, who is also residuary legatee, sells or mortgages an asset for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which renders it improper for the executor so to deal with the asset, that person's purchase or mortgage is

(*f*) See the observations of Lord Mansfield, in *Whale v. Booth*; and of Bayley, B., in *Doe v. Fallows*, *ubi supra*.

(*g*) *Whale v. Booth*, 4 T. R. 625, *in notis*; *Farr v. Newman*, 4 T. R. 642, 645. But Lord Mansfield intimated in *Whale v. Booth*, that if the purchaser *knew the debts were unpaid*, it would be a fraud and vitiate the sale. The rule, as laid down by Bayley, B., in delivering the judgment of the Court in *Doe v. Fallows*, *ubi supra*, was that the executor might make an effectual disposal of the assets in consideration of a debt of his own, and to discharge his own debt, if there were no fraud in the creditor in accepting of such disposal. An executor is not entitled to mortgage his testator's assets to a building society so as to charge them with his own general liabilities or responsibilities, as a shareholder of the society. Such a mortgage is not, however, void, but is good as against the beneficiaries to the extent of the money advanced and reasonable interest, provided it be not a colourable device to secure an advance to the executor in his personal capacity: *Thorne v. Thorne*, [1893] 3 Ch. 196.

(*h*) *Bonney v. Ridgard*, 1 Cox, 145, 148; *Scott v. Tyler*, 2 Dick. 724; *S. C.* 2 Bro. C. C. 433; *Hill v. Simpson*, 7 Ves. 152; *Andrew v. Wrigley*, 4 Bro. C. C. 136, by Lord Alvanley; *M'Leod v. Drummond*, 17 Ves. 154, 170, by Lord Eldon; *Keane v. Roberts*, 4 Madd. 357, 358, by Sir J. Leach; *Watkins v. Cheek*, 2 Sim. & Stu. 205; *Cubbidg v. Boatwright*, 1 Russ. Chan. Cas. 549; *Wilson v. Moore*, 1 M. & K. 337; *Eland v. Eland*, 4 M. & Cr. 427, by Lord Cottenham; *Pannell v. Hurley*, 2 Coll. 241; *Haynes v. Forshaw*, 11 Hare, 99, by Wood, V.-C.; *Cole v. Muddle*, 10 Hare, 186; *Downes v. Power*, 2 Ball & B. 491; *Collinson v. Lister*, 20 Beav. 356; *Re Morgan*, 18 C. D. 93, 98, *per* Fry, J.; *Ricketts v. Lewis*, 20 C. D. 745. And see *ante*, p. 696, n. (x). And now since the Judicature Act, 1873, the rule established in equity will govern the case as it is provided in that Act (s. 25, sub-s. 11), that the rules of equity shall prevail. It must not, however, be understood from this that the legal and equitable rights should be treated as identical, but only that the Court should administer both legal and equitable principles: *Joseph v. Lyons*, 15 Q. B. D. 280; *Cooper v. Vesey*, 20 C. D. 611; *Manners v. Mew*, 29 C. D. 725. But it is not enough to impeach a mortgage by an executor that the advances were originally made to him without security and that the security was afterwards added: *Miles v. Durnford*, 2 De G. M. & G. 641.

valid against any unsatisfied creditor of the testator (*a*). This doctrine applies to equitable no less than to legal assets (*b*).

If the executor be also specific legatee, a sale or mortgage from him of the specific legacy for satisfaction of his private debt will be safe, unless it can be shown that the purchaser or mortgagee knew there were debts unpaid (*c*).

Where there exists such collusion as to render the dealing invalid, not only a creditor, but a legatee, whether general or specific, is entitled to follow the assets (*d*). But they must enforce their right within a reasonable time, or it may be barred by their acquiescence (*e*).

where there is collusion legatees as well as creditors may follow the assets :

An executor cannot be allowed, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*f*). An executor is bound to do everything in his power for the benefit of the estate, and is therefore absolutely precluded from buying the assets, irrespective of undervalue or otherwise, because he may be thereby induced to neglect his duty (*g*).

an executor cannot purchase the assets from himself ;

On the same principle an executor of renewable leaseholds cannot obtain a renewal in his own name even though the lessor refuses to grant a renewal to the beneficiaries (*h*), and the principle has been extended to the purchase of the reversion expectant on the determination of the lease (*i*), but in the latter

(*a*) *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Lord Orrery*, 3 Atk. 235; *Taylor v. Hawkins*, 8 Ves. 209; *Whale v. Booth*, 4 T. R. 625, n. (*a*); *Storry v. Walsh*, 18 Beav. 559; *Graham v. Drummond*, [1896] 1 Ch. 968, 974.

(*b*) *Graham v. Drummond*, *ubi supra*.

(*c*) *Taylor v. Hawkins*, 8 Ves. 209; *Hall v. Andrews*, 27 L. T. 195; 20 W. R. 799; Coote on Mortg. 8th edit. 407.

(*d*) *Hill v. Simpson*, 7 Ves. 152; *M'Leod v. Drummond*, 17 Ves. 169; *Wilson v. Moore*, 1 M. & K. 337.

(*e*) *Elliott v. Merriman*, 2 Atk. 41; *Andrew v. Wrigley*, 4 Bro. C. C. 125; *M'Leod v. Drummond*, before Sir W. Grant, 14 Ves. 353, 359, 363; S. C., before Lord Eldon, 17 Ves. 152.

(*f*) *Hall v. Hallett*, 1 Cox, 134; *Watson v. Toone*, 6 Madd. 153. But see *post*, p. 715, as to a sale to an executor who refuses to act, or has renounced. Executors having been directed by a Will to sell the real estate, if they allow one of their number to hold buildings at less than a fair occupation rent, are chargeable with what would have been a fair occupation rent: *De Cordova v. De Cordova*, 4 App. Cas. 692.

(*g*) *Re Boles and British Land Co.*, [1902] 1 Ch. 244, 246.

(*h*) *Keech v. Sandford*, Sel. Ca. Ch. 61.

(*i*) *Phillips v. Phillips*, 29 C. D. 673.

case it only applies to leases renewable by contract or where there is a reasonable expectation that the lease will be renewed (*j*).

an executor
of a deceased
partner may
sell his share
to the sur-
viving partners.

But the executor of a deceased partner is warranted, in equity as well as at law, in selling the share of the deceased to the surviving partners, if this can be done fairly and properly: Though when such a relation subsists between the parties, Courts of Justice will look at such transactions with close attention; for in dealings between the executor of a deceased partner and the surviving partners there may be an inequality in respect of knowledge, which may be taken advantage of in such a way as to lead to inequitable and unfair results (*k*). Moreover, a surviving partner may take over the share of a deceased partner even though he is the executor of the deceased partner since the conflict of interest and duty has been brought about by the testator himself (*l*).

A sale is not avoided merely because, when entered upon, the purchaser may at his option become trustee for the property purchased (*e.g.*, by proving a Will under which he was named executor), if in point of fact he never does become such. Such a purchaser is under no disability, and, in order to avoid such sale, it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld (*m*).

Power of exe-
cutors to as-
sign leases:

It is a general rule, deducible from the principles which have been above investigated, that executors and administrators may, by virtue of their office, dispose absolutely of terms for years, which are vested in them in right of their testators or intestates (*n*); and may make a good title, even against a specific legatee, unless the disposition be fraudulent: So an executor or administrator may make an underlease of such term by leasing it for a fewer number of years and the rent reserved shall be assets in his hands, and go in a course of administration (*o*).

and make
underleases:

This, however, is an exceptional mode of dealing with the assets, and those who accept the title in that way must take it

(*j*) *Bevan v. Webb*, [1905] 1 Ch. 620.

(*k*) *Chambers v. Howell*, 11 Beav. 6.

(*l*) *Hordern v. Hordern*, [1910] A. C. 465.

(*m*) *Clark v. Clark*, 9 App. Cas. 733; cf. *Re Boles*, [1902] 1 Ch. 244; and see *post*, p. 715.

(*n*) *Bac. Abr. Leases* (I.), 7.

(*o*) *Ibid.* See *Re Owen*, [1912] 1 Ch. 519, where the sub-lease was made at a loss.

subject to the question whether it was the best way of administering the assets (*p*).

And although an executor or administrator may grant an underlease, if necessary for the due administration of the property, he cannot give an option of purchase at a future time (*q*).

It would seem that by virtue of sect. 2 (2) of the Land Transfer Act, 1897, an executor or administrator may now, in due course of administration, in a proper case, grant a lease of his testator's or intestate's real estate, but it might be difficult to show that such a course was the best way of administering the assets (*qq*).

If the executor or administrator dies without having administered the whole estate, it is not in the power of the executor of such executor or the administrator *de bonis non*, to avoid any such disposition made by the executor or administrator during his life.

In a case in the Court of Chancery in Ireland (*r*), where the children and widow of an intestate had agreed to divide his personal estate, including a lease of a farm for years, according to the Statute of Distributions, and afterwards the widow, not being disposed to abide by the arrangement, took out administration, and leased the farm at an undervalue to a person who had express notice of the agreement between the widow and children, and that she was by them called on to sell the intestate's interest in the farm: Lord Manners, C., set aside the lease on the application of the children, and expressed his opinion that even if the lease were at full value, yet, being taken by a person having notice that a sale was called for, it could not be sustained.

what under-
leases by exe-
cutors are
good in
equity :

It should be observed, that it has been held that a bequest of leaseholds to executors, *upon trust to sell*, and to invest the proceeds for the benefit of persons, some of whom are infants,

(*p*) *Oceanic Steam Co. v. Sutherland*, 16 C. D. 236, by Jessel, M. R., *ibid.* p. 243. In *Keating v. Keating*, 1 Lloyd & Goold, 133, Sir E. Sugden, C., observed that many circumstances would justify an executor in equity in granting a lease instead of selling the premises, and he would sustain such a lease by an executor simply acting in a due administration of the assets, but that a person could not be permitted to hold a reversionary lease from an executor with full notice, without showing that such lease was properly granted in the due administration of the executor's office.

(*q*) *Oceanic Steam Co. v. Sutherland*, 16 C. D. 236.

(*qq*) See *Re North*, [1909] 1 Ch. 625.

(*r*) *Drohan v. Drohan*, 1 Ball & Beat. 185.

will not enable them to grant an underlease: And the Court of Chancery will not enforce performance of an agreement to take such underlease (s).

when the power of an executor to assign or underlet is restrained by a condition not to assign, &c.

It remains to consider how far this power of the executor or administrator to assign or underlet may be restrained by the provisions contained in the lease itself. If a lease be made for a term of years, *upon condition*, that if the lessee shall assign his term without the assent of the lessor, it shall be lawful for the lessor to re-enter, the term shall nevertheless vest in the executor or administrator of the lessee without any breach of such condition (t). But a question arises, whether when a lease for years, with a condition or covenant restraining alienation or underletting, comes into the hands of the executor or administrator, he is warranted in assigning or making an underlease of it. Where the executor or administrator is *named* in the condition or covenant, he is bound thereby: Therefore, if a lease contain a proviso, that the lessee, his executors and administrators shall not set, let, or assign over the whole or part of the premises, without leave in writing, on pain of forfeiting the lease, the executor or administrator of the lessee cannot assign or underlet, unless by leave in writing, without incurring a forfeiture (u). So if the lessee covenant that he, his executors or administrators, shall not assign, without licence, except by his or their last Will and testament, and the lessee makes his Will and dies, the executors will be bound by the covenant, and cannot sell the term for payment of debts, without the licence of the lessor (x). But if the executors or administrators are not *named* in the proviso or covenant, it may be doubted whether the restriction will extend to them (y). Thus, in an anonymous

(s) *Evans v. Jackson*, 8 Sim. 217.

(t) *Parry v. Harbert*, Dyer, 45, b. It has been questioned whether a bequest of a term by Will to a *specific legatee* is not a breach of a condition not to alien: *Berry v. Taunton*, Cro. Eliz. 331; but see *Fox v. Swann*, Sty. 482; *Crusoe v. Bugby*, 3 Wills. 237; *Doe v. Bevan*, 3 M. & S. 331. On principle it would seem that the opinion of Bayley, J., in *Doe v. Bevan*, is correct, that *assignment* and *such* like words apply only to transfer *inter vivos*, and that if the lessor desire to exclude a specific devise of the term, he must do so by express words: Woodfall on Landlord and Tenant, 19th edit. 783. A covenant against assignment is not broken by an involuntary alienation—e.g., to the trustee in bankruptcy of the lessee: *Foa, Landlord and Tenant*, 5th edit. 275.

(u) *Roe v. Harrison*, 2 T. R. 425. See also *Doe v. Bevan*, 3 M. & S. 357.

(x) *Lloyd v. Crispe*, 5 Taunt. 249.

(y) *Roe v. Harrison*, 2 T. R. 429, by Ashurst, J. See also *Phillips v. Everard*, 5 Sim. 102.

case in *Dyer* (z), a question was asked upon these words in a lease, "And it shall not be lawful for the lessee to give, sell, or grant his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term;" the lessor and lessee die, and the executor sells the term without the leave of the heir: And it was holden, that this is out of the case of forfeiture, because the restraint was only during the lives of the lessor and lessee: And yet it was agreed in the bench, that the words above make a condition (a). So in *Seers v. Hind* (b), a point arose whether executors were warranted in disposing of a lease, as assets of the testator, where there was a proviso against alienation by the lessee: And Lord Thurlow said, "if A. lets a farm to B. with covenant not to alien, and B. dies, may not his executors dispose of it? I think it has been determined that they may; and I have always taken it as clear law. It is an alienation by the act of God. I remember, Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In case of a lease for years to A., it goes to his executor, not by way of limitation as in the case of a remainder over, &c., but as coming in the place of the lessee. I understood it to be well settled, as I have stated." But where a lease was made for years upon condition that the lessee, his executors or assigns, should not alien without the consent of the lessor, an assignment by the administrator of the lessee was held a breach of the condition; on the ground of the administrator being an assignee within the condition (c).

As to the question, whether, in case a term for years be forfeited by reason of the executor or administrator assigning or underletting without licence, relief can be obtained in equity; the general rule is, that a Court of Equity will not afford any relief against a forfeiture occasioned by assigning without licence (d). And in the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 14), where restrictions are placed on the forfeiture of leases for the breach of certain covenants, and relief against such forfeiture is given to the lessee, special exception is made in the case of a breach of a covenant not to assign, underlet,

(z) P. 66 a., pl. 8.

(a) See also Touchst. 133.

(b) 1 Ves. 294.

(c) *Sir Wm. More's Case*, Cro. Eliz. 26.

(d) *Lovat v. Lord Ranelagh*, 3 Ves. & Beam. 24.

part with the possession or dispose of the land leased (sect. 14, sub-sect. 6); against such a breach the Act gives no relief. However, where a lease contained a covenant, that if the lessee should let the premises for any longer period than three years, except to the wife or children of the lessee, without licence of the lessor and his assigns first had, then the said lease should be void, and the executor of the lessee sold the lease for the payment of the debts of his testator, the plaintiff, the purchaser, was relieved against the forfeiture (e).

Sect. 3 of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), provides that covenants against assigning, underletting, or parting with the possession or disposing of land or property leased without licence or consent shall be deemed to be subject to a proviso that no fine shall be payable for such licence or consent, though a reasonable sum may be charged for expenses incurred in relation to such licence or consent.

This subject may be concluded, by observing that the executor's or administrator's power of disposal over the assets is not at all controlled or suspended by the mere commencement of an action, on the part of a creditor of the deceased, for the administration of his estate: For the power of the personal representative to aliene and make a good title to any part of the assets continues until there has been judgment in the action (f).

The executor's power of disposal over the assets is not controlled by merely commencing an administration action.

Executor may endorse a bill of exchange.

A promissory note or bill of exchange made payable to the deceased or his order, may be endorsed by his executor or administrator (g). And, generally speaking, there is no difference between an endorsement of a note by the deceased and one by his personal representative (h).

(e) *Cox v. Brown*, 1 Chanc. Rep. 170; but *quære*, whether there was any forfeiture in this case.

(f) *Neeves v. Burrage*, 14 Q. B. 504. See *post*, p. 795; but see *Berry v. Gibbons*, L. R. 8 Ch. 747; *Halley v. O'Brien*, [1920] 1 Ir. R. 149.

(g) *Rawlinson v. Stone*, 3 Wils. 1. Where a person is under obligation to endorse a bill in the representative capacity, he may endorse the bill in such terms as to negative personal liability: Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (5). And if a person indebted to another gives him a blank acceptance for a certain sum, and the donee subsequently dies, his administrator may fill up the paper as a bill payable to drawer's order, insert his own name as drawer, and enforce payment thereof against the acceptor: *Scard v. Jackson*, 34 L. T. 65; 24 W. R. 159.

(h) *Watkins v. Maule*, 2 Jac. & Walk. 243; *Bromage v. Lloyd*, 1 Exch. 32; *Bishop v. Curtis*, 18 Q. B. 879.

Where a person signs a bill as drawer, endorser, or acceptor, and adds words indicating that he signs in a representative character, he is not personally liable; but the mere addition of words describing him as filling a representative character will not exempt him from personal liability (*i*).

Where the drawee of a bill is dead, presentment for acceptance may be made to his personal representative (*j*). The holder now has an option, and presentment is excused, and a bill may be treated as dishonoured by non-acceptance where the drawee is dead (*k*).

Bills of
Exchange
Act, 1882.

Where the drawee or acceptor of a bill is dead and no place of payment is specified, presentment for payment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found (*l*). Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence (*m*).

Wherever a power is given, if a personal trust and confidence be thereby reposed in the donee to exercise his own judgment and discretion, he cannot refer the power to the execution of another; for *delegatus non potest delegare*. Therefore, where a power of sale is given to executors, they cannot contract to sell by attorney (*n*). But this extends merely to the discretionary act. Having once exercised such discretion they are at liberty to complete the transaction by attorney. It has been held that an executor may assign and give a valid power of attorney to collect debts due to his testator (*o*).

Executors
cannot dele-
gate powers.

Where executors, who held shares as executors and were also directors of the company, agreed to vote always for the re-election of a particular director, it was held that the agreement was *intra vires* the executors and not a delegation of a discretion reposed in them by the testator (*p*).

(*i*) Bills of Exchange Act, 1882, s. 26 (1).

(*j*) S. 41 (1, c).

(*k*) S. 41 (2, a).

(*l*) S. 45 (7).

(*m*) S. 46 (1).

(*n*) *Combe's Case*, 9 Co. 75, *b*; Sugd. Powers, 8th edit. 179; cf. Farwell, Powers, 2nd edit. 440, 445.

(*o*) *Vane v. Rigden*, L. R. 5 Ch. 663.

(*p*) *Greenwell v. Porter*, [1902] 1 Ch. 530.

Power of
executors of
assured to
re-assure.

By the statute 19 Geo. II. c. 37, s. 4, re-insurance on ships was declared generally unlawful: but in case the assurer should die, his executors or administrators might make re-insurance, to the amount of the sum before by him assured, provided it was expressed in the policy to be a re-insurance. The intention of the legislature, in making this exception in favour of executors and administrators, seems to have been to provide a fund to satisfy the assured in case of a loss, without its falling on the estate of the deceased.

This was repealed, and re-insurance made lawful by statute 27 & 28 Vict. c. 56. Both these enactments were repealed by 30 & 31 Vict. c. 23, ss. 3, 4 (Sched. D), and thus re-insurances are legal by virtue of the common law (*q*) without any necessity for their appearing to be re-insurances on the face of them (*r*).

Power of
executors of
assured to
procure en-
dorsement of
policy.

In the case of a person insured against fire, the policy of insurance and interest therein shall continue to his heir, executor or administrator respectively, to whom the property insured shall belong, provided, before any new payment be made, such heir, executor, or administrator shall procure his right to be endorsed on the policy at the office, or the premium to be paid in the name of the heir, executor or administrator (*s*).

Power of
election by
executor.

An executor may in some cases claim by election; as where the testator, at the time of his death, was entitled out of several chattels to take his choice of one or more to his own use (*t*). If the thing, of which the election is given, is to be done *unicâ vice*, the election ought to be at the time (*u*). So if nothing passed or vested in the grantee, &c., before his election, it ought to be made in the life of the parties (*x*): As if a man gives to A. such of his horses, as A. and B. shall choose, the election ought to be in the life of A. (*y*). But where an interest vests immediately by the grant, &c., election may be made by the heir or executor, as well as by the party himself (*z*). As if a fine be of one hundred acres, and the conusee renders fifty to the conuser for years, his executor may choose which fifty he will have (*a*). If a man gives one of his horses to A. and B., after the death

(*q*) Arnould's Marine Insurance, 9th edit. vol. 1, sect. 323.

(*r*) *Mackenzie v. Whitworth*, 1 Ex. Div. 36.

(*s*) Porter, Laws of Insurance, 3rd edit. 195, 196.

(*t*) Toller, 174.

(*u*) Com. Dig. Election (B.); Co. Lit. 145, a. (*x*) *Ibid*.

(*y*) *Morris v. Livesay*, 1 Roll. Abr. 726, tit. Election (C.) pl. 6; Com. Dig. Election (B.).

(*z*) Com. Dig. Election (B.).

(*a*) 1 Roll. Abr. 725, tit. Election (C.) pl. 4; Com. Dig. *ubi supra*.

of A., B. may choose which he will take; for an interest vested in them immediately by the gift (*b*). So if the election determines only the manner or degree in which the grantee shall have the thing, his heir or executor, as well as the party himself, may make it; for in such case the interest vests immediately (*c*): As if a lease be granted to A. for ten or twenty years, as he shall elect, the executor is entitled to the election (*d*). So if A. makes a lease for years to B. of forty acres, parcel of sixty, the election may be made by B.'s executor (*e*). So if the thing of which election is given is annual, and to have continuance, the heir or executor may make the election (*f*).

So an option by a lessee to purchase the fee simple of the land demised may be exercised by his executor (*g*); and he may elect to take new shares in a company which his testator would have been entitled to have offered to him (*h*).

An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient. He may, if and as he thinks fit, accept any composition or any security, real or personal, for any debt or for any property real or personal claimed, and may allow any time for payment of any debt, and may compromise (*i*), compound, abandon, submit to arbitration, or otherwise settle, any debt, account, claim or thing whatever relating to the testator's estate, and, for any of those purposes, may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things, as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith (*k*).

Power of executor or administrator to accept composition, &c.
56 & 57 Vict. c. 53, s. 21.

(*b*) 1 Roll. Abr. 725, tit. Election (C.) pl. 5; Com. Dig. *ubi supra*.

(*c*) Com. Dig. *ubi supra*; Co. Lit. 145, *a*.

(*d*) Toller, 174.

(*e*) *Jones v. Cherney*, 1 Freem. 530. See as to uncertainty, *Jenkins v. Green*, 27 Beav. 437.

(*f*) Com. Dig. *ubi supra*; Co. Lit. 145, *a*.

(*g*) *Re Adams and Kensington Vestry*, ante, p. 519, n. (*x*).

(*h*) *James v. Buena Ventura Syn.*, [1896] 1 Ch. 456.

(*i*) As to the power of executors to compromise debts due from one of them to the estate, see *De Cordova v. De Cordova*, 4 App. Cas. 692, where such a compromise was set aside and the executor charged with the full amount payable by him as if the compromise had never been effected: the other executors being held liable for so much of the said amount as might have come to their hands but for their wilful default; but see *Re Houghton*, [1904] 1 Ch. 622.

(*k*) Trustee Act, 1893, s. 21. This section, which replaced sect. 37 of the Conveyancing Act, 1881, and extended it to administrators, applies to executorships, administratorships, and trusts constituted or created either before or after the commencement of the Act.

CHAPTER THE SECOND.

THE POWER AND AUTHORITY OF ONE OF SEVERAL EXECUTORS OR ADMINISTRATORS.

Co-executors.

CO-EXECUTORS, however numerous, are regarded in law as an individual person; and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all (a); for they have all a joint and entire authority over the whole property (b). Hence a release of a debt by one of several executors is valid, and shall bind the rest (c). So one of several executors may settle an account with

A release of a debt by one of two co-executors is valid.

(a) Touchst. 484; 3 Bac. Abr. 30, Exors. (C.) 1; Wentw. Off. Ex. 206, 14th edit.; *Ex parte Rigby*, 19 Ves. 462. "As between executors," says Lord Hardwicke, "there can be no division of their interest or authority: for though a man may appoint executors in such a manner that their authority may commence or determine at different times, yet he cannot nominate persons executors, and confine one of them to one branch of his estate, and another to another; for they have a joint authority, which extends to the testator's whole estate, and cannot be divided into distinct and separate powers": *Owen v. Owen*, 1 Atk. 495. But see *ante*, p. 171.

(b) 3 Bac. Abr. 30, tit. Executors, (D.) 1; Wentw. Off. Ex. 213, 14th edit.; *Owen v. Owen*, 1 Atk. 495.

(c) *Anon.*, Dyer, 23, *b*, in *margin*; *Jacomb v. Harwood*, 2 Ves. Sen. 267. Where an action was brought by two out of four executors and the two executors who were not joined in the action released the defendant, who pleaded the release *puis darrein continuance*; the Court of Exchequer refused to set aside the plea, the plaintiffs having failed to make out a case of fraud: *Herbert and Another v. Pigott*, 2 Cr. & M. 384. In *Charlton v. Durham*, L. R. 4 Ch. 433, a testator gave the residue of his estate to two executors on certain trusts. Part of his estate consisted of a bond given by the trustees of a minor, who came of age within a year after the death of the testator, and the executors then accepted his bond to them jointly in the place of the bond given by the trustees. Ten years afterwards a part of the money was paid by the obligor to one of the obligees, who embezzled the money so paid, and gave a receipt purporting to be signed by both the obligees, but in fact signed by one only, the signature of the other being a forgery. In a suit by the other executor and *cestuis que trustent* under the Will against the obligor, it was held that, though the obligor intended to have the receipt of both obligees, the receipt of one was sufficient to discharge the obligor, as the obligees were executors. See, however, *Lee v. Sankey*, L. R. 15 Eq.

a person accountable to the estate, and in the absence of fraud, the settlement will be binding on the others, though dissenting (*d*). So a grant or a surrender of the term by one executor shall be equally available (*e*). So the attornment of one shall be the attornment of the other (*f*). And the sale or gift of one of several executors, of the goods and chattels of the deceased, is the sale and gift of them all (*g*). Again, it is said, in the marginal notes of Lord Chief Justice Treby to Dyer (*h*), that if one of several executors confess the action, judgment shall be given against all (*i*). But in a case decided, Mich. T. 3 Geo. I. (*k*), there were three executors, one of whom gave a warrant of attorney to confess a judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor who gave the warrant *de bonis propriis* for the costs; upon motion to set this aside, it was held to be ill: for executors may plead different pleas (*l*), and that which is most for the testator's advantage shall be received (*m*). Further, it has been held that if one of two executors appointed by the obligee delivers a bond to a stranger in satisfaction of a debt

So is a grant or surrender of a term.

So is an attornment.

So is a sale or gift of chattels.

204, where the receipt of one trustee of a Will (though also an executor) was held not a sufficient discharge for moneys received by the authority of the two trustees of the Will.

(*d*) *Smith v. Everett*, 27 Beav. 446. And, where there are two or more executors of a holder of a bill, the endorsement of one is, *perhaps*, sufficient to transfer the property in the bill: Byles on Bills, 16th edit. 67.

(*e*) Dyer, 23, *b*, in *margin*; *Simpson v. Gutteridge*, 1 Madd. 616. See *Turner v. Hardey*, 9 M. & W. 770; *post*, p. 712, n. (*c*).

(*f*) Dyer, 23, *b*, in *margin*; 1 Madd. 616. So if one executor gets possession of the goods, and pays debts with his own money as far as the amount of them, this is a conversion of the goods of the testator to his own use, and justifiable by this executor against his co-executor: Dyer, 23, *b*, in *margin*.

(*g*) Touchst. 484; *Kelsock v. Nicholson*, Cro. Eliz. 478, 496; Dyer, 23, *b*, in *margin*. A purchaser of the subject of a specific legacy from one of several executors, who is also the legatee, is not bound to inquire whether the other executors have given their assent: *Cole v. Miles*, 10 Hare, 179. But where one of two executors, *erroneously believing that he was acting with the authority of the other*, contracted to sell a leasehold house, part of the testator's estate, it was held that the purchaser could not enforce a specific performance of the contract: *Sneesby v. Thorne*, 7 De G. M. & G. 399.

(*h*) P. 23, *b*.

(*i*) See also the judgment of Sir John Leach, V.-C., in *Simpson v. Gutteridge*, 1 Madd. 616; and *Lepard v. Vernon*, 2 V. & B. 54.

(*k*) *Elwell v. Quash*, Stra. 20.

(*l*) See *post*, Pt. v. Bk. II. Ch. I.

(*m*) See *Baldwin v. Church*, 10 Mod. 323; *Midgley v. Midgley*, [1893] 3 Ch. 282.

due from himself and dies, although the debt, as a *chose in action*, could not then have passed by the assignment. yet by this delivery the party had such an interest in the instrument, that he might justify the detention of it as against the surviving executor (*n*).

But equity will not assist to give a particular creditor an advantage.

In a case (*o*), where one of several executors assigned to a creditor of the testator a debt due to the testator's estate, it was holden by Sir W. Grant, that such an assignment was not available against the dissent of the other executors: His Honour observed, that if the single executor had parted with any portion of the property to the particular creditor, who by such an assignment had obtained a *legal* advantage, it could not, perhaps, be taken from him; but in the present case there was merely an assignment of a *chose in action*, of which no use could be made without the assistance of a Court of Equity; and that a Court of Equity would not interfere to give a particular creditor an advantage against the other executors and the general creditors.

An acknowledgment of a debt by one of two executors is valid:

but not as against a devisee.

An acknowledgment of a debt within Lord Tenterden's Act (9 Geo. IV. c. 14), s. 1, made by one of several executors as executor binds the testator's estate, and on the death of the executor who makes the acknowledgment, an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands or under the control of the surviving executors (*p*). But an acknowledgment made by an executor is not effectual to keep alive a debt against the devisee of real estate, supposing him to be a different person. Consequently it was held, where a testatrix died in 1887. that an acknowledgment by one of two executors and devisees in trust of real estate, against the wishes of the other, that more than six years' interest was due on a mortgage, could not be treated as the valid act of the two in their capacity of trustees, and was not a good acknowledgment within sect. 42 of the Real Property Limitation Act, 1833 (*q*).

(*n*) *Kelsock v. Nicholson*, Cro. Eliz. 478, 496; Dyer, 23, *b*, in *margin*. If there be any fraud between the executor and the creditor, and there be no assets besides to pay all the debts and legacies, there perhaps the other executor may have remedy in equity against his co-executor and the creditor: Touchst. 484. See *ante*, p. 699.

(*o*) *Lepard v. Vernon*, 2 V. & B. 51. See Judicature Act, 1873, s. 25, sub-s. 6. See also *Re Ingham*, [1893] 1 Ch. 352.

(*p*) *Re Macdonald*. [1897] 2 Ch. 181.

(*q*) *Astbury v. Astbury*. [1898] 2 Ch. 111.

It would seem, however, doubtful whether one executor may pay a statute-barred debt, notwithstanding the dissent of his co-executor, before it has been declared by a Court of competent jurisdiction that it is barred by the statute; also whether one executor may give a valid acknowledgment of a statute-barred debt, notwithstanding such dissent (*r*).

Query,
whether one
executor may
pay, or give a
valid acknow-
ledgment of, a
statute-barred
debt.

An assent to a legacy by one of several executors is sufficient (*s*). So, also, if one of several executors be a legatee, his single assent to his own legacy will vest the complete title in himself (*t*). Again, if the subject be entire, and be given to all the executors, the assent of one of them to his own proportion will be sufficient (*u*).

One of two
co-executors
may assent to
a legacy.

By the Companies (Consolidation) Act, 1908, s. 29, a transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although he is not himself a member, be as valid as if he had been a member.

Transfer of
shares.

By stat. 33 & 34 Vict. c. 71, the Bank of England may require all the executors who have proved the Will to join and concur in any transfer of stock standing in the name of their testator (*x*).

Again, there has already been occasion to show (*y*), that the act of one of two executors, in possessing himself of the testator's effects, is the act of the other, so as to entitle him to a joint interest in possession, and a joint right of action, if the effects are afterwards taken away: But it should be observed, that the act of one in taking possession of a chattel real or personal of the testator, cannot create a new *liability* and impose a charge on the other personally, and in his own individual character, which, without such act, would never have existed. Therefore, if one executor takes possession of and uses a personal chattel,

How far the
act of one
executor can
impose a
charge on his
companion.

(*r*) *Midgley v. Midgley, ubi supra; Astbury v. Astbury, ubi supra*, where Stirling, J., for the purposes of his judgment, but without deciding, assumed that one executor could.

(*s*) Godolph. Pt. 2, c. 30, s. 8, p. 245; Wentw. Off. Ex. 413, 14th edit.; Com. Dig. Administration (C. 8).

(*t*) 1 Roll. Abr. 618, tit. Devise, (B.) pl. 2; *Townson v. Tickell*, 3 B. & A. 31, 40; *Cole v. Miles*, 10 Hare, 179.

(*u*) *Punnel v. Fen*, 1 Roll. Abr. 618, Devise (B.) pl. 3; 1 Rep. Leg. 734, 3rd edit.

(*x*) See *ante*, p. 627. Nor is a transfer by one of two executors of railway shares or stock registered in the names of both of any validity, since these are governed by the Companies Clauses Act: *Barton v. North Staffordshire Rail. Co.*, 38 C. D. 464. See also *Barton v. L. & N. W. Rail. Co.*, 24 Q. B. D. 77.

(*y*) *Ante*, p. 680.

the other is not liable to the creditors for such act of his co-executor. So if one executor enter and enjoy land demised, and take the profits beyond the rent, the other executor will not be chargeable with the amount as assets to the creditors; but the one who actually received will alone be responsible (z). Hence, it appears, that with respect to the creditors, the actual possession and use by one of two executors is not in law the possession and use by both, so as to attach a liability upon both: Accordingly if, instead of disposing of a term of the testator, one of the executors takes the actual possession of and enjoys the land demised, such enjoyment is not by law the possession and enjoyment by both, and it does not render both chargeable to the lessor to pay a compensation to him for it, as joint occupiers in their own right (a).

The question how far a *devastavit* or receipt of assets by one of several executors can create a liability and impose a charge on his companions will be considered hereafter, when the subject of the Liabilities of Executors is discussed (b).

One of several executors cannot bind the others by his contract.

It should be further observed, that though one of several executors may dispose of the assets so as to bind the others, it is not to be inferred that one of several executors is the agent of the others, so as to bind them by his several contracts (c).

Co-administrators.

A distinction was drawn by Lord Hardwicke in *Hudson v. Hudson* (d), between the power of one of several administrators, and that of one of several executors, on the ground that the power of administrators arises wholly from the Ordinary, whereas that of executors arises wholly from the testator: And

(z) See *post*, Pt. IV. Bk. II. Ch. II. § II.

(a) *Nation v. Tozer*, 1 Crompt. M. & R. 172.

(b) *Post*, Pt. IV. Bk. II. Ch. II. § II.

(c) *Turner v. Hardey*, 9 M. & W. 770. This was an action for use and occupation, for a quarter's rent from Lady-day to Midsummer, 1841, to which the defendant pleaded that by an agreement made between the plaintiffs, executors of T., and the defendant, the defendant agreed to take of the plaintiffs, executors as aforesaid, the premises in question; and that it was afterwards agreed between them and W., that W. should become tenant to the plaintiffs from Lady-day, 1841, and that the defendant should be discharged from all liability to subsequent rent; and that the defendant accordingly gave up possession to W., and the plaintiffs accepted him as tenant: and it was held, that this plea was not proved by evidence that one of the plaintiffs had so agreed to accept W. as tenant in lieu of the defendant. But this case must not be understood as deciding that one of several executors may not alone accept a surrender of a term, the reversion of which belongs to them as executors. See *ibid.* 773, *per* Parke, B.

(d) 1 Atk. 460.

his Lordship laid down, on the authority of Lord Bacon (e), that as an administration was in the nature of an office, so if it be granted to several, they must join in executing the acts of their office (f); and, therefore, the release of one would not bind the others, as in the case of co-executors. But in the subsequent case of *Willand v. Fenn* (g), it was held in the King's Bench, after three arguments, that one of several administrators stands on the same ground and foundation with one of several executors. And this decision was recognized by Sir John Strange, M. R., in *Jacomb v. Harwood* (h), in which he distinguishes the common law from the ecclesiastical law.

The power of two or more executors is not determined by the death of one, for the whole survives to the other or others (i). And so likewise, if administration has been granted to two, and one dies, the other will be sole administrator, and all the power of the office will survive to him (k).

Survivor of several executors or administrators.

The ordinary functions incident to the office of executor may be exercised by one of several appointed executors, although the others renounce. At common law, where a power was given by Will to executors to sell land, and one of them refused the trust, it was clear that the others could not sell (l). But the stat. 21 Hen. VIII. c. 4, provides, that where lands are willed to be sold by executors, and part of them refuse to be executors, and to accept the administration of the Will, all sales by the executors that accept such administration shall be as valid as if all the executors had joined. And by the Conveyancing Act, 1911, s. 12, all dispositions of real estate by the proving executors are as effectual as if all the persons named as executors had

Exercise of power given to several executors to sell land:

when one of them renounces:

(e) Elements, vol. iv. p. 83.

(f) See also *In the goods of Nayler*, 2 Robert. 409; and Dyer, 339.

(g) Cited by Sir John Strange, M. R., in 2 Ves. Sen. 267. See a MS. report of the case in Selw. N. P. 767, note (8), 6th edit.

(h) 2 Ves. Sen. 267, 268. See also Touchst. 485, 486; *Smith v. Everett*, 27 Beav. 454, per Romilly, M. R. However, Sir John Nicholl seems, on more than one occasion, to have adverted to the distinction as still existing. See *Warwick v. Greville*, 1 Phillim. 126; *Stanley v. Bernes*, 1 Hagg. 222. It has been held in America that a note executed to an intestate may be transferred by one of several administrators: *Sanders v. Blain*, 6 J. J. Marsh. 446; 22 Amer. Dec. 86; *Murray v. Blatchford*, 1 Wind. 583; 19 Amer. Dec. 537.

(i) *Flanders v. Clarke*, 3 Atk. 509.

(k) *Hudson v. Hudson*, Cas. temp. Talb. 127; ante, p. 388.

(l) Co. Lit. 113, a.

concurred therein (*m*). Upon the former statute, Lord Coke observes (*n*) that although the letter of it extend only to cases where executors have a power to sell, yet being a beneficial law, it is by construction extended to cases where lands are devised to executors to be sold. It has also been held that the statute extends to copyholds (*o*).

In the case of *Denne v. Judge* (*p*), a testator devised land to five trustees to sell and apply the money to certain uses, and afterwards made the same persons executors; the question was, whether the land passed under the deeds of lease and release, purporting to have been executed by all the five trustees, but in fact executed by three of them only; and it was urged that the case was within the above statute of 21 Hen. VIII. c. 4: But Lord Ellenborough said, that the statute was passed to remedy the inconvenience where some of the executors refuse to act; but in the present case there was no such refusal: Besides, the estate was not devised to them as executors, to be sold, but as devisees, though they were also appointed executors: They had nothing to do with the land as executors (*q*).

If, however, the fund when raised, had been distributable by them in that character, it would have been otherwise, as far as respects the latter objection to the application of the statute. Thus in *Bonifaut v. Greenfield* (*r*), where the testator devised land to four persons and their heirs to sell, and apply the money to the performance of the Will, and, in the conclusion of the Will he appointed the four his executors, it was held, that on the refusal of one of them to act, a sale by the other three was good.

Now, under sects. 1 (1) and 2 (2) of the Land Transfer Act, 1897, in the case of persons dying after the commencement of the Act, the real estate, as defined by the Act, of the deceased, becomes vested, notwithstanding any testamentary disposition, in his personal representatives; as if it were a chattel real; and their powers, rights, duties and liabilities with respect to per-

(*m*) 1 & 2 Geo. V. c. 37, s. 12. See, however, Land Transfer Act, 1897, s. 2 (2), *infra*.

(*n*) Co. Lit. 113, *a*.

(*o*) *Peppercorn v. Wayman*, 5 De G. & Sm. 230.

(*p*) 11 East, 288.

(*q*) But taking the conveyance to be by the three trustees only, it severed the joint-tenancy, and conveyed three-fifths of the estate to be held in common with the two remaining parts. See *Taylor v. London & County Bank*, [1901] 2 Ch. 231.

(*r*) Cro. Eliz. 80.

sonal estate are now applicable also to real estate for purposes of administration, except that some or one only of several joint personal representatives cannot sell or transfer it without the authority of the Court. But a sale or transfer may now be made by the proving executor or executors alone and without the authority of the Court (s).

It is said by Lord Coke (*t*), that although one executor refuses to act, the others cannot sell to him, because he is a party and privy to the Will, and remains executor still. But that statement must be considered as overruled by the decision of the Court of Common Pleas, in *Mackintosh v. Barber* (*u*), in which case there were six executors, three of whom proved the Will and three renounced, and the three executors who had proved sold estates to one of the executors who had renounced, and conveyed them to a trustee for him: one of the questions raised was—could the three and the six respectively sell to one of themselves who had renounced probate? And the question was answered by the Court of Common Pleas in the affirmative, and the Court of Chancery acted on their opinion. Whether such a sale can be supported in equity must depend upon the circumstances. In the above-mentioned case the Master had found that it would be for the benefit of the *cestuis que trust* that the contract should be completed (*v*).

In the case of *Granville v. M'Neile* (*w*), where a power, contained in a deed of settlement of real estate, enabled one of the parties, his executors, administrators and assigns, on a vacancy to appoint a new trustee, and the party so empowered died, having by his Will named three executors, one of whom renounced probate, it was held by Wigram, V.-C., that a vacancy in the trust having occurred, the two acting executors had power to appoint the new trustee: And his Honor said that, in all such cases, the question is, whether the confidence is reposed in the individuals named or in the persons who, *de facto*, fill the given office: and that, in the present case, the intention plainly was, that those whom the party trusted to administer his property, should also be trusted to exercise the power given to him in the settlement; and that those whom he trusted were the persons who acted, and not those only whom he named.

Exercise of power to appoint a new trustee, given to a man, and his executors, when he is dead and one of his executors renounces:

(s) Conveyancing Act, 1911, s. 12.

(t) Co. Lit. 113, *a*.

(u) 1 Bingh. 50.

(v) Sugd. on Pow. 8th edit. 125, and cf. *ante*, p. 699.

(w) 7 Hare, 156; *Re Boucherett*, [1908] 1 Ch. 180.

exercise of
power by
surviving
executors:

Again, it has appeared that if one of two executors dies, the office survives to his co-executor (*x*). But it is necessary further to enquire, whether, if a power is given to several executors, and one of them dies, the power can be exercised by the survivors or survivor. It is regularly true at common law, that a naked authority given to several cannot survive (*y*). Therefore, if a man devise his lands to A. for life, and direct that after his decease the estate shall be sold by the executors, naming them, as by B. and C. his executors, or by B. and C. who are not named executors, in that case, if one of them die during the life of A., the other cannot sell; because the words of the testator would not be satisfied (*z*). But where the power is annexed to the office, rather than entrusted to the individuals named, a Court of law will relax the rule (*a*). Therefore, if three or more executors are appointed, and the devise is, that the estate shall be sold by the executors generally, there it would seem that the survivors may sell, because the power is annexed to the office (*b*). But it cannot be regarded as settled that a power given to several as a class can in all cases be exercised, after the death of one member of the class, by the survivors (*c*).

by a single
survivor.

Again, although the authorities are conflicting (*d*), there are not wanting cases to support the validity of the exercise of a power given to executors by a single survivor (*e*). Mr. Hargrave in a note to Co. Lit. (*f*) strongly contends that where a power of selling is given to *executors*, or to persons, *nominatim in that character*, the survivor may sell, as the power is annexed to them *ratione officii*; and as the office survives, by parity of reason the authority should also survive. And Lord St.

(*x*) *Ante*, p. 713.

(*y*) Sugd. Pow. 8th edit. 126; Farw. Pow. 2nd edit. 454, 457; *Brussey v. Chalmers*, 16 Beav. 233.

(*z*) Co. Lit. 113, *a*; Sugd. Pow. 8th edit. 127; Farw. Pow. 2nd edit. 455 *et seq.*, where the subject of survivorship of powers will be found discussed.

(*a*) Cf. *Crawford v. Forshaw*, [1891] 2 Ch. 261; *Re Smith*, [1904] 1 Ch. 139, *post*, p. 721.

(*b*) Cf. Farw. Pow. 2nd edit. 461.

(*c*) Farw. Pow. 2nd edit. 456. But see Co. Lit. 113, *a*; Sugd. Pow. 8th edit. 128.

(*d*) See a case in Dyer, 219, pl. 8, *in margine*; *Lock v. Loggin*, 1 And. 145.

(*e*) *Houel v. Barnes*, Cro. Car. 382; *S. C.*, *nom. Barnes' Case*, W. Jones, 352, pl. 3; *Anon.*, 2 Leon. 220, pl. 276; *Milward v. Moore*, Sav. 72; and see *Anon.*, Dyer, 371, *b*, pl. 3; Sugd. Pow. 8th edit. 126. See also *Eaton v. Smith*, 2 Beav. 236.

(*f*) 113, *a*.

Leonards observes (*g*) that the liberality of modern times will probably induce the Courts to hold, that in every case where the power is given to *executors*, as the office survives, so may the power (*h*). The same distinguished writer proceeds to state as the result of the cases, that where the authority is given to "executors," and the Will does not expressly point to a joint exercise of it, even a single surviving executor may execute it: But where the authority is given to them *nominatim*, though in the character of executors, yet it is at least doubtful whether it will survive. This is, of course, prior to the provisions of the Conveyancing Acts, 1881 and 1911, and of the Trustee Act, 1893, below referred to. In the case of *Brassey v. Chalmers* (*i*) a power to sell real estate had been given by a testator "to my executors hereinafter named with the approbation of my trustees for the time being: " And it was held by Romilly, M. R., upon the context of the Will, that the power could not be exercised by the survivor of the two appointed executors: His Honor, after stating the rule that a naked power given to several cannot be executed by the survivors, laid it down as equally settled that if the power be annexed to the office of executor, any persons who fill the office will have the power; but that the difficulty was, in cases where the power is given to certain persons by name and they are also appointed executors, to ascertain whether the power is given to the executor or to the person: In the present case, the learned judge looking at the words used by the testator, both in the passage which conferred the power and in other parts of the Will, was of opinion that the power was given to the two executors *nominatim*, and not in their executorial capacity. But the Lords Justices, on appeal (*j*), dissented from this opinion.

Where a testator empowered his three executors named in his Will to select the charitable institutions amongst which his residue was to be divided, and one of the executors renounced probate, it was held by the Court of Appeal that the power was given to the executors in the character of executors, and that the two who had proved could exercise it alone (*k*).

(*g*) Sugd. Pow. 8th edit. 128.

(*h*) So where the power to executors to sell arises by implication (see *ante*, p. 499), the power to the survivor to sell will arise in the same way: *Forbes v. Peacock*, 11 M. & W. 630.

(*i*) 16 Beav. 231.

(*j*) 4 De G. M. & G. 528.

(*k*) *Crawford v. Forshaw*, [1891] 2 Ch. 261. See also *Re Smith*, [1904] 1 Ch. 139; *Re Boucherett*, [1908] 1 Ch. 180.

And now by sect. 22 of the Trustee Act, 1893, which replaced sect. 38 of the Conveyancing Act, 1881, where a power or trust is given to, or vested in, two or more trustees (which expression by sect. 50 of the Trustee Act, 1893, is defined as including executors and administrators) jointly, then, unless the contrary is expressed in the instrument (if any) creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. This provision, however, applies only to trusts constituted after, or created by instruments coming into operation after 31st December, 1881. By the Conveyancing Act, 1911, s. 8, the personal representative or representatives of a sole or surviving trustee may exercise any power or trust capable of being exercised by such trustee (*l*).

Executors
must all join
in bringing
actions.

If there are several executors appointed by the Will, they must all join in bringing actions at law (*m*); even though some be infants (*n*).

Where, however, one executor of several has alone proved the Will, he may sue without making the other executors parties, although they have not renounced (*o*). If one of several executors who have all proved the Will sue alone, the defendant may apply to the Court for an order that the other executor or executors may be joined as co-plaintiffs (*p*).

When one
executor may
sue the other :

Generally speaking, it is clear that at law one executor cannot sue or be sued by his co-executor (*q*): neither, after the death of one of several executors, can his executor be sued by the surviving co-executor for a debt due to their testator (*r*).

(*l*) *Ante*, p. 200.

(*m*) Bro. Exors. 88.

(*n*) *Smith v. Smith*, Yelv. 130. As to one of several executors making a summary application to the Court, see *Re Bunting*, 2 A. & E. 467.

(*o*) D. C. P. 8th edit. 171, 184. See Conveyancing Act, 1911, ss. 8, 12.

(*p*) R. S. C. 1883, Ord. XVI. r. 11. This procedure is substituted for the plea in abatement and demurrer for want of parties existing prior to the Judicature Act. It is of course subject to the same rules with respect to showing that the party whose joinder is claimed is alive and within the jurisdiction as were in force with regard to the old plea, and the necessary facts should now be shown by affidavit in support of the application. And further by Ord. XVI. r. 11, the consent of the person added as plaintiff must be obtained, unless he is under disability: Chitty's Archbold, 14th edit. 1019, 1020.

(*q*) Wentw. Off. Ex. 75, 14th edit.; *ante*, p. 681. But see *post*, Pt. v. Bk. I. Ch. II., as to remedies in equity.

(*r*) Wentw. Off. Ex. 75, 14th edit.

Nevertheless, if a debtor makes his creditor and another his executors, and the creditor neither proves the Will nor acts as executor, he may bring an action against the other executor (s): nor is it necessary to enable him so to do, that he should renounce in the Court of Probate (t).

In a case where the survivor of two executors, who had taken out administration to the other, filed a bill to set aside a mortgage of part of the assets made by the deceased executor as having been a breach of trust, it was held that the fact of the plaintiff having taken out the administration did not disqualify him from maintaining the suit (u).

In *Gleadon v. Atkin* (x) an action of debt, on a common money bond, was brought by the executor of the obligee against the executors of the obligor: The money mentioned in the condition was part of the personal estate of Cuthbert Thew, deceased, by whom it had been bequeathed to the testator of the plaintiff (the obligee) and the testator of the defendant (the obligor) and the survivor of them, and the executors and administrators of such survivor on trust, to put the same out at interest on such real or other sufficient security as they might approve. The testator of the plaintiff died leaving the testator of the defendant surviving who had since died: And it was held by the Court of Exchequer, on general demurrer, that the loan by one of the executors to the other was a misappropriation of the fund, for which the executor of the obligee was liable until the money was laid out on real and sufficient security; and consequently that he had a right to sue on the bond to protect himself.

on bond given
as a security
on loan of
assets by one
to the other.

Where there are several executors, they may agree that one of them shall hold the land devised to them in trust at a fixed rent, and if the rent falls into arrear, he may be distrained upon in respect of it (y). If, however, executors, having been directed by the Will to sell the real estate, allow one of their number to hold stores and buildings at less than a fair occupation rent, they are chargeable with what would have been a fair occupation rent (z).

Demise by
executors to
their co-
executor.

(s) *Dorchester v. Webb*, W. Jones, 345.

(t) *Rawlinson v. Shaw*, 3 T. R. 557.

(u) *Miles v. Durnford*, 2 De G. M. & G. 641.

(x) 2 Crompt. & Jerv. 548.

(y) *Cowper v. Fletcher*, 34 L. J. Q. B. 187; Co. Lit. 186, a.

(z) *De Cordova v. De Cordova*, 4 App. Cas. 692.

CHAPTER THE THIRD.

THE POWER AND AUTHORITY OF AN EXECUTOR OF AN EXECUTOR:
—OF AN ADMINISTRATOR DE BONIS NON: AND OF A LIMITED
ADMINISTRATOR.

Executor of
executor:

AS to the power and authority of the executor of an executor: In all cases, except of special trust and authority without the office of executorship, the executor of an executor, how far soever in degree remote, stands as to the points both of being, having and doing, in the same state and plight as the first and immediate executor (*a*).

when he can
execute a
power:

“But where, by a Will,” says the author of the Office of an Executor (*b*), “a special trust is recommended to an executor, as to sell land, this not performed in his lifetime shall not be performable by his executor: contrariwise of an interest, as to take the profits of lands for certain years towards payment of debts and legacies” (*c*). In the case of *Cole v. Wade* (*d*), real and personal estate were by Will given to two trustees, who were appointed executors, their executors, administrators, and assigns for the benefit of such relations of the testator as the trustees and executors in their discretion should think proper: And it was declared that the disposition should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them; and the testator gave power to his trustees and executors, and the survivor of them, and the heirs, executors, and administrators of such survivor, to sell or mortgage the estates; and the trustees (by name), or the survivor of them, or the heirs, executors or administrators of such survivor, were to convey and pay the whole of the relations within fifteen years: The surviving trustee, by

(*a*) Wentw. Off. Ex. c. 20, p. 462, 14th edit.

(*b*) C. 20, p. 462, 14th edit.

(*c*) See also as to this distinction between an interest and an authority only, *Style v. Thomson*, Dyer, 210, *a*.

(*d*) 16 Ves. 27; *S. C.*, *sub nom. Walter v. Maunde*, 19 Ves. 423. See further as to this case, Farw. Pow. 2nd edit. 460.

his Will, devised the first testator's real estate to A. & B., their heirs and assigns, and his personal estate to them, their executors, administrators, and assigns, upon the trusts of the first Will, and appointed them his trustees for that specific purpose only: and it was contended, that they might execute the power: The Master of the Rolls (Sir W. Grant) decided the contrary: he said, that wherever a power is of a kind that indicates a personal confidence, it must *primâ facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom, by legal transmission, the same character may happen to belong: The power was not appendant to the estate; by itself it was incapable of alienation: and it was only *quasi personæ designatæ* that it could go to the heir: The devisees did not answer that description: The power, therefore, was not vested in them (e). The Court of Appeal, however, in *Crawford v. Forshaw* (f), where *Cole v. Wade* was cited, declined by necessary implication, though not in express terms, to adopt this principle; and in *Re Smith* (g), Farwell, J., says: "The result of the authorities and of sects. 22 and 37 of the Trustee Act (h) is in my opinion this: Every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being: whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a

(e) Cf. *ante*, pp. 716, 717; Sugd. Pow. 8th edit. 126—128. This opinion of Sir W. Grant was approved of by Lord Eldon on appeal, in *Walter v. Maunde*, 19 Ves. 425. See further on the question whether the executor of an executor, or the devisee of a trustee, can execute a power or trust originally conferred on his testator, or whether it is a personal confidence which is not transmissible with the office or estate: *Down v. Worrall*, 1 M. & K. 561; *Cooke v. Crawford*, 13 Sim. 91; *Titley v. Wolstenholme*, 7 Beav. 425, 433 (which was treated by Jessel, M. R., as having overruled *Cooke v. Crawford*: see *Osborne to Rowlett*, 13 C. D. 77, 786; the latter case was, however, itself doubted by the Court of Appeal in *Re Morton and Hallett*, 15 C. D. 143; and by Parker, J., in *Re Crunden and Meux*, [1909] 1 Ch. 690; *Cooke v. Crawford* cannot therefore be treated as overruled); *Mortimer v. Ireland*, 6 Hare, 196; *Wilson v. Bennett*, 5 De G. & Sm. 475; *Macdonald v. Walker*, 14 Beav. 556; *Re Burt*, 1 Drewr. 319; *Forbes v. Forbes*, 18 Beav. 552; *Saloway v. Strawbridge*, 1 Kay & J. 371; *Hall v. May*, 3 Kay & J. 590.

(f) [1891] 2 Ch. 261.

(g) [1904] 1 Ch. 139, 144; *Re De Sommery*, [1912] 2 Ch. 622.

(h) The Trustee Act, 1893 (56 & 57 Vict. c. 53).

very wide personal discretion is not enough to exclude the *primâ facie* presumption, and little regard is now paid to such minute differences as those between 'my trustees,' 'my trustees A. and B.' and 'A. and B. my trustees': The testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language."

Down to the end of the year 1911 the person who was to execute a trust or power must have been a person who was in some way pointed out by the creator of the trust or power as the proper person to execute it (*i*). But by the Conveyancing Act, 1911, s. 8 (*k*), the personal representatives of a sole or last surviving trustee may exercise any power given to such trustee (*k*).

With respect to a power to sell land, Hargrave, in a note to Coke upon Littleton (*l*), cites some authorities (*m*) to show that such a power given to the executors shall pass to their executors or administrators (*n*). Again, it has appeared in a former part of this Treatise, that a power in a Will to sell or mortgage, without naming a donee, will, unless a contrary intention appear, vest in the executor, if the fund is to be distributable by him (*o*). And it seems, that in such case, the executor of the executor may sell, the intent being, that the power shall be executed by him to whose hands the money is to come (*p*).

It seems clear that the rules applicable to the devolution of the estate of an executor or administrator, as regards personal estate, will now apply to real estate vesting in an executor under the Land Transfer Act, 1897, and that the power of sale now vested in an executor under that Act is accordingly exercisable by the executor of the latter in the event of his death, and so on throughout the chain of representation.

Where a power is annexed to an interest in the donee, and is originally authorised to be executed by the donee of the power and his assigns, the power will pass with the interest to any

(*i*) *Re Crunden and Meux*, [1909] 1 Ch. 690, where it was held that the executors of the last surviving trustee could not exercise a power of sale.

(*k*) 1 & 2 Geo. V. c. 37, s. 8, set out *ante*, p. 200.

(*l*) 113, *a*.

(*m*) Kelw. 44; 2 Brownl. 194.

(*n*) See also the cases collected, *supra*, note (*e*).

(*o*) *Ante*, p. 499. See also *Tylden v. Hyde*, 2 Sim. & Stu. 238.

(*p*) Sugd. Pow. 8th edit. 116, 118; Farw. Pow. 2nd edit. 93; 1 Pow. Dev. 243, Jarman's edit.

person who comes to the estate under him, although there be twenty mesne assignments; and whether the claimant is an assignee in fact, or an assignee in law, as an heir or executor(*q*). In a case where, upon a fine, the use of lands was limited to A. for eighty years, with a power to A. and his assigns to make leases for lives; and A. assigned over to B., who died, and made C. his executor, and then the executor assigned over to D.; it was holden, that D. might well exercise the power(*r*).

With regard to the power and authority of an administrator *de bonis non*; By the grant of that species of administration, the administrator becomes the only personal representative of the original deceased: and, with respect to the estate left unadministered by the former executor or administrator, he has the same power and authority as the original representative; for he succeeds to all the legal rights which belonged to the former executor or administrator in his representative character(*s*).

Power of administrator *de bonis non*.

With regard to the power and authority of limited and of special administrators, it is difficult to lay down any general proposition: and little more can be done than to refer to the authorities upon the subject which have already been adduced, in treating of the constitution of these several kinds of administration, with respect to the power of an administrator appointed as the attorney of the party entitled *durante absentia*, of an administrator *durante minore ætate*, of an administrator *pendente lite*, and of an administrator limited to substantiate proceedings in equity(*t*).

Power of limited and of special administrators.

It is enacted by statute 38 Geo. III. c. 87, s. 7, that the person to whom administration *durante absentia* (*u*) shall be granted under the provisions of the Act, shall have the same powers vested in him as an administrator hath by virtue of an administration granted to him *durante minore ætate* of the next of kin.

(*q*) Sugd. Pow. 8th edit. 180.

(*r*) *Howe v. Whitebank*, 1 Freem. 476.

(*s*) *Catherwood v. Chabaud*, 1 B. & C. 154, by Bayley, J. See *ante*, p. 685.

(*t*) *Ante*, Pt. I. Bk. v. Ch. III.

(*u*) See *ante*, p. 410.

CHAPTER THE FOURTH.

THE POWER OF A FEME COVERT EXECUTRIX OR ADMINISTRATRIX.

Capability of a married woman to be an executrix or administratrix : provisions of the Married Women's Property Act, 1882, with respect to such capability of married women.

SINCE the commencement of the Married Women's Property Act, 1882, a married woman may be, and act as, executrix or administratrix of a deceased person as if she were a feme sole, without the consent or control of her husband. This power is given to her by sections 1 (2) and 24 of the Act, which provide: 1 (2) that "A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued either in contract, or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by, or taken against, her."

And 24, that "The word 'contract' in this Act shall include the acceptance of any trust or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration."

Section 18 of the same Act provides that "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid (a), or any sum

(a) This has reference to sect. 6, which provides that "All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of

forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole."

This enactment supersedes the old law by which a married woman could not take upon herself the office of executrix or administratrix without the consent of her husband. By that law, since the husband was answerable for the wife's acts, she was not capable, though she had by his permission assumed the office of executrix or administratrix, of doing any act of administration to the deceased which might have been to the prejudice of her husband, without his concurrence. The reason for this is now at an end, since by the Act as above stated, a husband is not subject to the liabilities incurred by the wife by reason of any breach of trust or devastavit either before or after her marriage, unless he has himself acted or intermeddled in the trust or administration. It also follows that since the Act, as he is no longer under any liability for his wife's breach of trust or devastavit as above stated, a husband has no longer any power or disposition over the personal estate vested in his wife as executrix or administratrix, inasmuch as such power of disposition which he had prior to the Act was given to him for the purpose of administering in his wife's right for his own safety.

It was held by North, J., in *Re Harkness and Allsopp's Contract* (b), that the Act does not enable a woman married

the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman."

(b) [1896] 2 Ch. 358, 363. In *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647, it was held that the decision in *Re Harkness and Allsopp's Contract* was not applicable to the case of a married woman who is a mortgagee and not a trustee. A mortgagee, under an ordinary mortgage deed, is not a trustee of the mortgaged property until he has been paid his principal, interest, and costs, and then he becomes a bare trustee. The property is held subject to an equity of redemption, but until redemption it belongs to the mortgagee as his own. Under sect. 16 of the Trustee Act, 1893, which has now replaced

The law on this subject prior to the Married Women's Property Act, 1882.

since the commencement of the Act, being a trustee of real estate for sale, to convey to a purchaser except with the concurrence of her husband and by a deed acknowledged by her.

But now, by the Married Women's Property Act, 1907, a married woman is able without her husband to dispose of or join in disposing of real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a feme sole. The Act operates to render valid all such dispositions made after 1882 (*c*).

A married woman suing without her husband being joined not liable to give security for costs.

A married woman suing as plaintiff without her husband being joined since the Married Women's Property Act, 1882, is not liable to give security for costs (*d*).

The law on the subject of the power of a feme covert as executrix or administratrix, and the power of the husband of such executrix or administratrix, as it existed prior to the Married Women's Property Act, 1882, is stated and discussed with the authorities bearing upon it in the eighth and previous Editions of this Work, Pt. III. Bk. I. Ch. IV.

sect. 6 of the Vendor and Purchaser Act, 1874, a married woman who is a bare trustee can convey as if she were a feme sole, and on being paid all principal money, interests, and costs due to her under her mortgage, she would become a bare trustee: *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451, 456. The decision in *Re Brooke and Fremlin's Contract* was followed by Farwell, J., in *Re West and Hardy's Contract*, [1904] 1 Ch. 145.

(*c*) 7 Edw. VII. c. 18, s. 1.

(*d*) *Threlfall v. Wilson*, 8 P. D. 18.

BOOK THE SECOND.

THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR, WITH RESPECT
TO THE FUNERAL: THE PROVING OF THE WILL AND THE
TAKING OUT ADMINISTRATION: THE INVENTORY AND THE
PAYMENT OF DEBTS.

CHAPTER THE FIRST.

THE FUNERAL: PROVING THE WILL, AND TAKING OUT
ADMINISTRATION: AND THE INVENTORY.

SECTION I.

The Funeral.

THE law, as laid down in *Williams v. Williams* (a), and in other cases, is that as there can be no property by the law of this country in a dead body, a person cannot dispose of his body by Will, and that after death the custody and possession of the body belong to his executors until it is buried, and when it is buried in consecrated ground it remains under the protection of the Ecclesiastical Court of the diocese, and cannot be removed from the grave or vault, or mausoleum in which it has been placed, except under a faculty granted by the Ecclesiastical Court, and then only to another grave or vault in consecrated ground. Consequently a faculty will not be granted to enable a body to be removed from consecrated ground with a view to its being cremated (b).

No property in a dead body.

Custody and possession of body belong to the executor until buried, and then remains under protection of Ecclesiastical Court.

If the deceased has left directions as to the disposal of his body, it is the duty of his personal representative to give effect to his wishes. But if the deceased has left no testamentary or clear directions as to his body, it is entitled to Christian

Directions of deceased as to burial should

(a) 20 C. D. 659.

(b) *Re Dixon*, [1892] P. 386.

be given effect to.
Body should not be cremated without such directions.

burial (c), and the executor would not be warranted, to gratify his own fancy, without the deceased's sanction, in cremating the body of his testator, and so depriving it of being buried in the state and condition contemplated by this rule of law. It is not a misdemeanour or illegal to burn a dead body instead of burying it, unless it is so done as to amount to a public nuisance (d). The Burial Service does not contemplate cremation. But where a body has been consumed in a fire, it has been customary to collect the ashes and to bury them in a churchyard, accompanied with the use of the Order for the Burial of the Dead, and there does not appear to be any legal objection to the same course being followed where there has been a previous cremation in pursuance of directions left by the deceased (e).

What expenses are allowable as against creditors:

The deceased should be buried in a manner suitable to the estate he leaves behind him (f). Funeral expenses, says Lord Coke (g), according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever. But the executor or administrator is not justified in incurring such as are extravagant, even as it respects legatees or next of kin entitled in distribution (h): Nor, as

(c) *Gilbert v. Buzzard*, 2 Hagg. Cons. 333, 343; *Reg. v. Stewart*, 12 A. & E. 773.

(d) *The Queen v. Price*, 12 Q. B. D. 247; and see Cremation Act, 1902.

(e) *Re Dixon*, [1892] P. at p. 394.

(f) 2 Black. Comm. 508.

(g) 3 Inst. 202. In the case of persons dying domiciled in any part of the United Kingdom on and after 1st June, 1888, the executor or administrator has power to deduct debts and funeral expenses from the value of the estate and effects as specified in the account delivered by him. The funeral expenses to be deducted "*shall include only such expenses as are allowable as reasonable funeral expenses according to law*": 44 Vict. c. 12, s. 28. And under sect. 7 of the Finance Act, 1894, in determining the value of an estate for the purpose of estate duty, allowance is to be made for reasonable funeral expenses and for debts and incumbrances.

It seems clear that expenses not directly relating to the funeral, such as for embalming the body of the deceased and bringing it home from abroad for burial in this country, or for putting his family and servants into mourning, or for erecting a monument to his memory, are not a proper deduction under this section, although if an executor has incurred them under the directions in the Will he may be entitled to retain them out of the estate as against the creditors. As to tombstones, see *Goldstein v. Salvation Army Ass. Soc.*, [1917] 2 K. B. 291.

(h) See *Stackpoole v. Stackpoole*, 4 Dow. 227. A husband, executor of his wife's Will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral though such estate is insufficient for creditors and her Will does not contain any charge for debts and funeral expenses: *Re M'Myn*, 33 C. D. 575.

against creditors, shall he be warranted in more than are absolutely necessary. In strictness, said Lord Holt, no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, ringing the bell, and the fees of the parson, clerk, and bearers: but not for the pall or ornaments (*i*). And in the year 1695, it was stated that Baron Powel on his circuit would allow but 11s. 6d. under a plea of *plene administravit*; which he said was all the necessary charge (*k*). However, it appears that Lord Holt, where under that plea 150*l.* was charged for the testator's funeral, said that at least 140*l.* ought to be deducted; for 10*l.* is enough to be allowed for the funeral of one in debt (*l*).

Lord Hardwicke in *Stag v. Punter* (*m*), upon exceptions to a Master's report for not allowing 60*l.* for the testator's funeral, said: "At law, where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40s., then 5*l.*, and at last 10*l.* (*n*). I have often thought it a hard rule, even at law, as an executor is obliged to bury his testator before he can possibly know whether his assets are sufficient to pay his debts: But this Court is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent: As this is the case here, I am of opinion that sixty pounds is not too much for the funeral expenses, especially as the testator had directed his corpse should be buried at a church thirty miles from the place of his death."

In *Hancock v. Podmore* (*o*), issue was taken, in an action, by a creditor against an executor, on a plea of *plene administravit*, and it was proved that assets to the amount of 129*l.* had come to the hands of the defendant, and that he had paid 55*l.* for probate duty, and 79*l.* for funeral expenses: The deceased had been a captain in the army, and the question was, whether the

(*i*) *Shelly's Case*, 1 Salk. 296. Perhaps, observes Dr. Burn, the expenses of the shroud and digging the grave ought to have been added: 4 Burn, E. L. 348, 8th edit.

(*k*) *Anon.*, Comberb. 342.

(*l*) *Ibid.*

(*m*) 3 Atk. 119.

(*n*) But in Buller's N. P. 143, it is said that the usual method is to allow five pounds: and in Selwyn's N. P. 776, *n.* 18, 6th edit., a MS. case of *Smith v. Davies*, Middlesex Sittings after M. T. 10 Geo. II., is mentioned, where this latter sum was allowed by Lord Hardwicke himself.

(*o*) 1 B. & Ad. 260.

defendant could, as against a creditor, apply so large a sum as 79*l.* to such a purpose: The Court of King's Bench was of opinion that the sum was too great to be allowed: But Mr. Justice Bayley, in delivering the judgment of the Court, observed, that although the rule is, that, as against a creditor, no more shall be allowed for a funeral than is necessary, yet in considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party; and his Lordship observed that the sum of 10*l.* mentioned by Lord Hardwicke as the established allowance in his time, might perhaps, in the present day, be less than what should be reasonably allowed for a person of condition: The learned judge proceeded to intimate, that the Court thought 20*l.* would be a proper sum for the funeral of a person in the degree and consideration of life of this testator (*p*).

It must not, however, be understood that the Court, in *Hancock v. Podmore*, laid it down as a rule, that even the sum of 20*l.*, should be the limit of the allowance, where the estate is insolvent: but that it was the proper limit under the circumstances of that case: The rule appears to be, that the executor is entitled to be allowed reasonable expenses, according to the testator's condition in life; and if he exceed those, he is to take the chance of the estate turning out insolvent: No precise sum can be fixed to govern executors in all cases: It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place (*q*).

In *Bissett v. Antrobus* (*r*), Sir L. Shadwell, V.-C., refused to allow 2,210*l.* for the funeral expenses of a deceased nobleman, whose personal estate was believed to be solvent at his death, but ultimately, from unforeseen circumstances, proved to be insolvent: And his Honour referred it to the Master to inquire and state what sum ought to be allowed.

With respect to allowances for funeral expenses where there are assets sufficient, as against other persons than creditors: In *Offley v. Offley* (*s*), there had been 600*l.* laid out in Mr. Offley's

(*p*) See *Yardley v. Arnold*, Carr. & M. 434, 438, *per* Parke, B., *accord*.

(*q*) *Edwards v. Edwards*, 2 Cr. & M. 612. See also *Reeves v. Ward*, 2 Scott, 395.

(*r*) 4 Sim. 512.

(*s*) Prec. Chan. 26.

funeral, and the Court decreed that sum to be a debt to affect the trust estate, Mr. Offley being a man of great estate and reputation in his county, and being buried there: but if he had been buried elsewhere, it seemed his funeral might have been more private, and the Court would not have allowed so much (*t*).

In *Paice v. The Archbishop of Canterbury* (*u*), a payment of 93*l.* 12*s.* 6*d.* for mourning rings distributed among the relations and friends of the deceased was allowed by Lord Eldon to the executors: The Will had not given any directions on the subject, but committed "any thing not specified" to the discretion of the executors (*x*).

In *Mullick v. Mullick* (*y*), on an appeal to the Privy Council from an order of the Supreme Court of Bengal, it was held, with respect to the expenses of the funeral obsequies of a Hindoo testator, that, as the Will gave no directions how they were to be performed, the only question to be considered was, whether the sums allowed for their performance were more than had usually been expended at the funerals of persons of the same rank and fortune as the deceased.

The question of the liability of an executor or administrator, for the expenses of the funeral of the deceased, will be considered in a subsequent part of this Treatise (*z*).

Liability of
executor for
funeral ex-
penses.

(*t*) See *Stackpoole v. Stackpoole*, 4 Dow. 227; *Bridge v. Brown*, 2 Y. & Coll. C. C. 181.

(*u*) 14 Ves. 364.

(*x*) In *Johnson v. Baker*, 2 Carr. & Payne, 207, Best, C. J., held that a demand for mourning, furnished to the widow and family of the testator, is not a funeral expense, such as can be claimed against the estate by the executor, if he gives the order for it; and, consequently, that a legatee, who had not received his legacy, was a competent witness, under the old law, on behalf of the executor in an action brought against him for the recovery of such demand. A small sum for a headstone is sometimes passed in executors' accounts, but in *Bridge v. Brown*, 2 Y. & Coll. C. C. 181, a sum of 20*l.* spent on a tombstone by the executors was disallowed by the Master; see *Goldstein v. Salvation Army Ass. Soc.*, [1917] 2 K. B. 291. In *Pitt v. Pitt*, 2 Cas. temp. Lec, 508, Sir G. Lee allowed a widow for her mourning, in her account, as administratrix, in the Ecclesiastical Court.

(*y*) 1 Knapp, 245.

(*z*) *Post*, Pt. IV. Bk. II. Ch. II. § I.

SECTION II.

Proving the Will and taking out Administration.

55 Geo. III.
c. 184.

Penalty for
not proving
Wills or
taking letters
of administra-
tion, within
a given time.

By stat. 55 Geo. III. c. 184, s. 37, it is enacted, "that if any person shall take possession of, and in any manner administer (a), any part of the personal estate and effects of any person deceased, without obtaining probate of the Will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, or within two calendar months after the determination of any suit or dispute respecting the Will, or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the Will or letters of administration of the estate and effects of the deceased" (b).

By stat. 47 & 48 Vict. c. 62, s. 11, the production of a grant of representation from a Court in the United Kingdom of probate or letters of administration or confirmation is necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom.

By sect. 19 of the Revenue Act, 1889 (52 & 53 Vict. c. 42); where a life policy is effected by a person who dies domiciled abroad the production of a grant of representation is not necessary to establish the right to receive the policy moneys (c).

Power of an
executor to
compel pro-
duction of
testamentary
papers.

The power of an executor to compel the production of Wills and other testamentary papers, for the purposes of probate, and the mode of doing so, when the instruments happen to be in the custody of other persons, have been pointed out in a previous part of this Work (d).

(a) As to the meaning of the words "take possession of and in any manner administer," see *Att.-Gen. v. The New York Breweries Co., Ltd.*, [1898] 1 Q. B. 205; [1899] A. C. 62; and see *Re Stevens*, [1898] 1 Ch. 162.

(b) See also stat. 28 & 29 Vict. c. 104, s. 57.

(c) *Haas v. Atlas Insurance Co.*, [1913] 2 K. B. 209.

(d) *Ante*, p. 222.

SECTION III.

The making of an Inventory by the Executor or Administrator.

The statute 21 Hen. VIII. c. 5, provides for the making of inventories by executors and administrators of all the goods, chattels, wares, merchandises as well movable as not movable whatsoever that were of the deceased, and by stat. 22 & 23 Car. II. c. 10, s. 1, an administrator must have entered into a bond conditioned amongst other things for his exhibiting into the Registry of the Court, at or before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession (*e*). The bond given under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77) (*f*), is conditioned to make the inventory when lawfully called on, and to exhibit the same whenever required by law so to do (*g*).

The Ancient Ecclesiastical Law was very strict with respect to the making of inventories (*h*); and it will be observed, that the statute of Car. II. required executors or administrators to exhibit inventories, as part of their duty, without any proceeding to call upon them to do so (*i*). The old practice of the Prerogative Court of Canterbury was to require an inventory to be exhibited *before* probate was granted; and this continued prevalent in some country jurisdictions (*j*).

According to the modern practice, neither the executor nor administrator exhibits any inventory whatsoever, unless cited for that purpose, at the instance of a party interested (*k*).

In what cases and by whom the exhibiting an inventory compellable.

(*e*) As to the account of particulars of personal estate, required with the affidavit from the person applying for probate or letters of administration in England, see 43 Vict. c. 14, s. 10.

(*f*) See sects. 23 and 87 as to inventories.

(*g*) See Probate Rules and Orders, Form XVI.

(*h*) See Swinb. Pt. 6, ss. 6, 8, 9: and the consequence of neglecting to make one, seems to have been to prevent the executor from relying on want of assets. See *Ibid.* Pt. 3, s. 17, pl. 8. Even the temporal Courts formerly considered the neglect of this duty in a light unfavourable to the party, especially where there was a deficiency of assets; and although not conclusive on him, yet exposing him to imputation: *Orr v. Kaines*, 2 Ves. Sen. 193.

(*i*) An administrator who neglected to exhibit his inventory by the time specified in the bond given under the statute of Car. II. thereby incurred a breach of the condition, without any citation. See *Ritchie v. Rees*, 1 Add. 152. *Secus*, as to the bond given under the Court of Probate Act: *In the goods of Jones*, 3 Sw. & Tr. 28; *Baker v. Brooks*, *ibid.* 32.

(*j*) *Phillips v. Bignell*, 1 Phil. 240, by Sir John Nicholl.

(*k*) *Phillips v. Bignell*, 1 Phil. 240; Toller, 250. However, the

Although, however, inventories are not now required in practice to be exhibited without being so called for, yet the practice is by no means obsolete (*l*), and an executor or administrator is compellable to exhibit one at the prayer of any person having an interest, or even the *appearance* of an interest (*m*). Thus, the personal representative of the residuary legatee of him who was the residuary legatee of the original testator has sufficient interest for the purpose of calling on his personal representative to exhibit an inventory (*n*). Again, it has been laid down in a variety of cases, that a probable or contingent interest will justify a party in calling for an inventory and account (*o*).

Thus, if a creditor swears to certain sums due from the deceased to him, it is enough to entitle him to an inventory, though the debt be contested (*p*). So where the assignees of a bankrupt made an affidavit of a debt due from the deceased to the bankrupt, the administrator was assigned to exhibit an inventory, notwithstanding the Statute of Limitations had run out since the administration was granted (*q*).

So the Court will compel an executor to bring in an inventory, &c., at the suit of a creditor by a bond of the testator, notwithstanding its alleged invalidity; and though a suit is actually commenced on the bond, and then depending at common law (*r*). And the Court will not notice the effect of

Court may, in some instances, require *ex officio*, that an inventory shall be exhibited: 1 Phillim. 240; *In the goods of Williams*, 3 Hagg. 217; *Acastor v. Anderson*, 1 Robert. 674. And, under the old practice, it was always most prudent for the executor or administrator to exhibit it before a final settlement: *Kenny v. Jackson*, 1 Hagg. 106.

(*l*) *In the goods of Jenkins*, 76 L. T. 164.

(*m*) *Phillips v. Bignell*, 1 Phil. 241; *Gale v. Luttrell*, 2 Add. 236. Having regard to the form of affidavit for Inland Revenue, an application for an order to exhibit an inventory is now very seldom made, but since the affidavit is filed in the Inland Revenue Office and not in the Probate Division, and is not accessible to everybody, it may in some cases still be convenient to apply to the registrar of the Probate Division for an inventory to be exhibited. See further as to the persons compellable to exhibit an inventory, *post*, p. 736.

(*n*) *Winchlow v. Smith*, 1 Cas. temp. Lee, 417.

(*o*) *Salter v. Sladen*, Prerog. M. T. 1792; *Snow v. Strutt*, Prerog. H. T. 1793, cited 1 Phil. 241, *per curiam*; *Myddleton v. Rushout*, 1 Phil. 244; *Reeves v. Freeling*, 2 Phil. 57; *Burgess v. Marriott*, 3 Curt. 424.

(*p*) *Smith v. Price*, 1 Cas. temp. Lee, 569; *Hackman v. Black*, 2 Cas. temp. Lee, 251.

(*q*) *Phillipson v. Harvey*, 2 Cas. temp. Lee, 344. See also *Wainford v. Barker*, 1 Ld. Raym. 232.

(*r*) *Gale v. Luttrell*, 2 Add. 234. See also Oughton, tit. 240, ss. 9, 10. Accordingly, an inventory and account was ordered on the application of a party, who, twenty-four years after the death of the

any release which a legatee may have given (*s*). Likewise, an executor who is also residuary legatee may call on his co-executor for an inventory (*t*): and so he may, perhaps, without any special interest (*u*).

But in *Boon's Case* (*v*), where a legacy was to be paid at three several payments, and the executor having made two, and tendered the third, was cited by the legatee to bring in an inventory, it was holden by the Delegates, and also on a Commission of Review, that there was no need of an inventory at his instance. So in *Fleet v. Holmes* (*x*), in a suit for the recovery of a legacy, Sir G. Lee refused to decree an inventory, thinking it useless; because the executrix had in her answers confessed assets sufficient to cover the legacy, and the interest claimed thereon and the costs of the suit. Again in *Leighton v. Leighton* (*y*), where an executrix, being cited to exhibit an inventory, gave in a declaration *loco inventarii*, in which she declared that the deceased, by a bill of sale, in consideration of a debt due to her, had duly granted to her all the personal estate of which he should die possessed, Sir G. Lee held that the declaration was sufficient, and refused to compel an inventory. So where a party showed sufficient interest for calling on the executor to exhibit an inventory, but not to see portions allotted and distribution made, the Court would accept an admission of assets in lieu of an inventory, or any other admission which would enable the Court to exercise a discretion and not to call for an inventory (*z*).

testator, had commenced an action against his executors on a covenant by him by way of guarantee, the object of the applicant being to ascertain, whether there were any assets before he incurred further expense: And Sir H. Jenner Fust said it was the duty of the executors, notwithstanding they insisted that the estate of their testator was not liable, either to exhibit an inventory and account, or to admit assets sufficient to answer the demand: *Jickling v. Bircham*, 2 Notes of Cas. 463.

(*s*) *Kenny v. Jackson*, 1 Hagg. 105. See also *Acastor v. Anderson*, 1 Robert. 672.

(*t*) *Paul v. Nettleford*, 2 Add. 237.

(*u*) *Huggins v. Alexander*, Prerog. 1736; 2 Add. 238, note (*a*). There is only one case in which the application of a party having any kind of interest is refused—viz., if a creditor has brought a suit in Chancery for the discovery of assets, the party shall not proceed in both Courts: *Myddleton v. Rushout*, 1 Phillim. 247; *Brotherton v. Hellier*, 2 Cas. temp. Lee, 134.

(*v*) Sir T. Raym. 470.

(*x*) 2 Cas. temp. Lee, 101.

(*y*) *Ibid.* 356.

(*z*) *Burgess v. Marriott*, 3 Curt. 424.

After what lapse of time an inventory may be compelled.

Although no statute or rule of positive law has fixed any time certain, within which an inventory and account must be sued, and time alone is not to be considered a bar (*a*), still reason and justice prescribe some limitation: And in cases where there has been a great lapse of time between the death of the party, and the citation calling for the inventory, the Court has frequently refused to enforce the exhibition of an inventory (*b*). Thus, it was held (*c*), that the lapse of forty-five years, in conjunction with circumstances, afforded a reasonable presumption of the estate having been fully administered; and that therefore the inventory and account might be dispensed with. So where, twenty-four years after the death of the intestate, eleven years after the youngest child attained twenty-one, and seven years after his insolvency, his provisional assignee sued the administratrix for an inventory and account; and it appeared, that shortly after the intestate's death, a valuation and inventory had been made, and facts were shown from which it might be fairly presumed that the insolvent had received more than his share; the Court refused the application (*d*). So in *Bowles v. Harvey* (*e*), a party having, after a lapse of thirty-five years, called for an inventory and account of an insolvent estate, the executor, who appeared under protest, was dismissed with costs. Again in *Scurrah v. Scurrah* (*f*), an application to compel an administratrix to exhibit an inventory after the lapse of eighteen years was rejected, and the applicant, under the circumstances, was condemned in costs. And on another occasion (*g*), in a case of inventory and account brought by a legatee, a declaration (instead of an inventory) setting forth desperate debts due to, and large debts due from the estate, but annexing no vouchers nor accounts, was held sufficient for a lapse of seventeen years: and Sir John Nicholl laid down that in such a suit the Court cannot decide whether debts alleged to be due from the estate are a legal set-off (*h*).

What persons are compelled.

The parties who may be cited to exhibit an inventory and

(*a*) *Jickling v. Bircham*, 2 Notes of Cas. 463, stated *ante*, p. 735, note (*r*).

(*b*) *Burgess v. Marriott*, 3 Curt. 426.

(*c*) *Ritchie v. Rees*, 1 Add. 144.

(*d*) *Pitt v. Woodham*, 1 Hagg. 247.

(*e*) 4 Hagg. 241.

(*f*) 2 Curt. 919.

(*g*) *Higgins v. Higgins*, 4 Hagg. 242.

(*h*) See further, as to the fulness requisite for a declaration, *Leighton v. Leighton*, 2 Cas. temp. Lee, 356; *Akerman v. Gybbon*, *ibid.* 511.

account are not confined to the executor or administrator himself, or even to those who, upon the death of the executor or administrator, succeed to the representation of the original testator or intestate. Thus, in *Ritchie v. Rees* (i), Sir John Nicholl held, that the representatives of a deceased administrator *cum testamento annexo*, although not at the same time those of the first testator, were liable to be called on for an inventory and account, upon a reasonable presumption being raised that any part of the effects of the first testator had travelled into their hands (k): The learned judge was further of opinion that a party, having an interest in the effects, was entitled to call upon such representatives for the inventory, without first taking a *de bonis non* grant of the effects of the first testator. So the executors of a deceased executor, though not the personal representatives of the original testator (there being an executor of the original testator still surviving), are compellable to bring in an inventory of the effects of the original testator (l).

liable to
exhibit an
inventory.

An attorney who takes administration in the name of another may be compelled by the latter to exhibit an inventory and account (m). So an administrator *durante minoritate* may be compelled to give in an inventory, although his administration has expired (n).

An administrator *pendente lite* might have been compelled to exhibit an inventory, although a bill in Chancery for a discovery had been filed against him by another party (o). But his executors cannot be called on for such an inventory, in a suit respecting his Will by the representatives of a party claiming an interest, not pronounced for in the suit pending which he was appointed administrator (p).

The Ecclesiastical Court discouraged all hanging back with respect to the production of an inventory when called for; and generally condemned the parties who were guilty of it in costs (q). Where probate of a Will had passed in August, 1815, and the inventory had been assigned since the first

Consequences
of hanging
back when an
inventory as-
signed.

(i) 1 Add. 158.

(k) See *Holland v. Prior*, 1 M. & K. 245, 246, 247.

(l) *Gale v. Luttrell*, 2 Add. 234.

(m) *Bailey v. Bristowe*, 2 Robert. 145.

(n) *Taylor v. Newton*, 1 Cas. temp. Lee, 15.

(o) *Brotherton v. Hellier*, 2 Cas. temp. Lee, 131.

(p) *Lascelles v. Jobber*, 1 Cas. temp. Lee, 443.

(q) *Phillips v. Bignell*, 1 Phillim. 241, 243.

Form and
contents of
an inventory.

session of Hilary Term, 1816, the Court in Easter Term of that year pronounced the executrixes contumacious (*r*).

The inventory exhibited by an executor or administrator ought to contain a full, true, and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causâ* of the testator or intestate (*s*). It must also distinguish such debts as are separate from those which are doubtful or desperate (*t*). But it was not necessary, according to the modern practice, that the appraisement and inventory should be made pursuant to the letter of the statute; and it was sufficient if the goods of the deceased should be appraised by any honest persons in the neighbourhood, and reduced into an inventory (*u*), which, when exhibited at the instance of a party interested, must be verified by special oath, either personally or by virtue of a commission; for the formal general oath of the executor or administrator will not be sufficient (*x*).

The Court can only require that all the deceased died possessed of should be included in the inventory: It cannot call for an account of the subsequent profits in his business (*y*). The Court formerly had no jurisdiction over leaseholds of the deceased for lives or other real estate (*z*), but now, since the commencement of the Land Transfer Act, 1897, the inventory should include such real estate as is included in sect. 1 (1) of that Act. Again, since the passing of the Finance Act, 1894, it would seem that an inventory should also include personal estate situate in a foreign country in respect of which estate duty is payable, since such foreign assets are now within the

(*r*) *Griffiths v. Bennet*, 2 Phillim. 364.

(*s*) Toller, 248. The usual form of the head of the inventory was stated by Sir G. Lee, in *Plunket v. Sharpe*, 1 Cas. temp. Lee, 624, to be "a true and perfect inventory of all the goods, chattels, and credits of the deceased, that have come to the hands, possession, or knowledge" of the party. By Rules and Orders, 1862 (Contentious Business), 76: "In contentious business, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be filed, unless by order of the judge or of a registrar": and the form of an Inventory is given, No. 27. See *post*, Pt. v. Bk. II. Ch. III., as to declarations in lieu of inventories.

(*t*) Toller, 248.

(*u*) 1 Oughton, tit. 233, ss. 1, 2; 4 Burn, E. L. 310, 8th edit.

(*x*) 1 Oughton, *ubi supra*, note (*d*), 2; Toller, 250.

(*y*) *Pitt v. Woodham*, 1 Hagg. 250.

(*z*) *Saville v. Morgan*, 1 Cas. temp. Lee, 431.

cognizance of the Court (*a*). In some instances, particularly in complicated cases, the Court will exercise a discretion as to the sort of inventory it will accept (*b*).

These matters will be further considered hereafter, when the subject of Remedies against Executors and Administrators in the Probate Division is considered (*c*).

The Court of Queen's Bench on more than one occasion decided, that, after an inventory was exhibited, the Ecclesiastical Court could entertain no objections to it (*d*).

Whether the
Spiritual
Court could
entertain
objections to
an inventory.

Notwithstanding such decisions, it always continued the practice of the Prerogative Court of Canterbury to entertain objections to inventories (*e*).

But although the Ecclesiastical Court would allow an allegation to be given in objection to an inventory, and answers to be taken upon that allegation, yet it would not permit *witnesses* to be examined upon that allegation, in order to falsify the inventory (*f*). The foundation for this distinction is, that if the answers confess more assets than were inserted in the inventory, the Court may order the inventory to be amended by the insertion of these; but if further assets might be established by witnesses in opposition to the answers, the Court could not order them to be inserted in the inventory, which is required by the statute to be upon oath: nor could it compel the executor or administrator to swear to assets, the possession of which he has twice already upon oath denied (*g*).

An important question arises, with respect to the effect of inventories in the Common Law Courts, viz., how far an inventory exhibited by an executor or administrator is evidence against him, as proof of assets. But it will be more convenient

Effects of
inventory in
temporal
Courts.

(*a*) *Raymond v. Von Watteville*, 2 Cas. temp. Lee, 551; *Wilson v. Ogle*, Prerog. 1737, cited 2 Cas. temp. Lee, 555. See sect. 2 (2) of the Finance Act, 1894.

(*b*) *Reeves v. Freeling*, 2 Phillim. 56.

(*c*) See *post*, Pt. v. Bk. II. Ch. III.

(*d*) *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1222; *Henderson v. French*, 5 M. & S. 406; *Griffiths v. Anthony*, 5 A. & E. 623.

(*e*) *Telford v. Morison*, 2 Add. 319; *Shackleton v. Barrymore*, cited *ibid.* p. 329.

(*f*) *Telford v. Morison*, 2 Add. 331.

(*g*) *Ibid.* It is suggested in a note to *Brogden v. Brown*, 2 Add. 340, by the reporter, that *where the executor is also the party before the Court propounding the Will*, the Court might perhaps permit depositions to be taken on the allegation, if the answers should prove unsatisfactory.

to consider this point in a subsequent part of this Treatise, together with the subject of Remedies generally (*h*).

A declaration is now in some cases substituted for an inventory.

Rule 42 (Non-Contentious Business) provides that "when any person takes letters of administration in default of the appearance of the person cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the registry, and the sureties to the administration bond must justify."

The declaration would now comprise such real estate as is included under sect. 1 of the Land Transfer Act. 1897 (*i*).

SECTION IV.

Collecting the Effects.

The next duty of the executor or administrator is to collect all the goods and chattels of the deceased. For that purpose the law invests him with large powers (as it has already appeared, in considering the quantity of his estate, as well in action as possession): And it is incumbent on him to avail himself of his authority with reasonable diligence in the collection of the effects of the deceased. Therefore, if by unduly delaying to bring an action, the executor or administrator has enabled a debtor of the deceased to avail himself of the Statute of Limitations, the executor or administrator will be personally liable (*k*). So the executor or administrator was obliged, within a convenient time, to remove all the personal property of the deceased which he might have left on any land which went to the heir, or to a reversioner or remainderman: otherwise such property might be distrained as *damage feasant* (*l*). In the case of *Stodden v. Harvey* (*m*), a lessee for life of a house and pasture land died; his executors suffered his cattle to go there

(*h*) See *post*, Pt. v. Bk. II. Ch. I.

(*i*) See Rule 109 (Principal Registry) of 20th Nov., 1897.

(*k*) *Hayward v. Kinsey*, 12 Mod. 573, *post*, Pt. IV. Bk. II. Ch. II.

§ II.

(*l*) See *ante*, p. 689.

(*m*) Cro. Jac. 204.

for six days after his death, and then removed them; and in trespass justified for that time, averring that in the space of six days they could not procure any other land or place whereon to put the cattle: The plaintiff demurred; and whether that were a convenient time to move them was the question: The Court inclined to be of opinion that six days was but a convenient time for removing, especially it being averred, that they had not any other place to remove them to.

SECTION V.

Estate Duty.

It would be outside the scope of this Work to deal with the subject of Estate duty generally, and especially with the many difficult questions as to the incidence of duty arising for the most part on settlements, with which executors as such have little or nothing to do. But since it is one of the first duties of a legal representative to pay Estate duty, some notice of the subject seems to be here required. It is proposed, therefore, in this section to limit the consideration of the Acts to such provisions as more particularly concern executors and administrators; but before dealing with those provisions in detail it may be useful to make some general observations on the subject.

The liability imposed by the Finance Act, 1894, s. 6 (2), on the executor is to pay Estate duty on all free personalty whether in the United Kingdom or not (subject to sect. 2 (2)), including personalty over which the deceased had a general power of appointment (sect. 22 (2) (a)), and including money which he had a general power of charging on property (sect. 22 (2) (c)). But this liability is limited to the assets which the executor has or might have received (sect. 8 (3)). He is not, under sect. 6 (2), accountable for the Estate duty on realty, though *semble* he may be under sect. 8 (4).

The executor must to the best of his knowledge and belief specify in appropriate accounts annexed to the Inland Revenue affidavit all property liable to duty (sect. 8 (3)), and the rate of duty will in the first instance be calculated on the value of the estate as appearing in those accounts (sect. 8 (7)). The Commissioners, on being satisfied with the *primâ facie* correctness of the affidavit and the accounts, allow as a rule the affidavit

to be stamped so as to enable probate to be granted. If it turns out that too little duty has been paid the matter is dealt with by means of a corrective affidavit (Customs and I. R. Act, 1881, s. 32). If the executor does not know the amount or value of any property which has passed on the death, he may state that he does not know the value thereof and he must undertake to bring in an account and pay the duty (sect. 6 (3)). Payment of duty may be postponed where it cannot be raised without excessive sacrifice (sect. 8 (9)) or in respect of an interest in expectancy until it falls into possession (sect. 7 (6)).

Although under no obligation to pay duty on property other than the free personalty as stated above, the executor *may* pay the duty on any other property which is under his control as executor, such as real estate, and he *may* also pay the duty on property not under his control, but in this latter case only at the request of the persons accountable for the duty (sect. 6 (2)). In the case of duty which the executor may but is not bound to pay, he can recover the amount paid from the trustees or owners of the property (sect. 9 (4)), or he may raise the amount of duty, either before or after he pays it, by sale or mortgage of the property (sect. 9 (5)).

The above is a brief outline of the provisions of the Finance Act, 1894, which more or less directly refer to payment of Estate duty by executors and administrators. These provisions will be found set out *in extenso* in the following pages together with the amendments made by subsequent enactments. but these amendments are for the most part of minor importance and it is not necessary here to do more than mention two of them, namely, the introduction of Increment Value duty passing on death by the Finance Act, 1910, and the abolition of Settlement Estate duty by the Finance Act, 1914, s. 14 (a).

The Finance Act, 1894, provides as follows:—

Collection and
recovery of
Estate duty.

“6.—(1.) Estate duty (*b*) shall be a Stamp duty, collected and recovered as hereinafter mentioned (*c*).

(a) Sect. 14 of the Finance Act, 1914, provides as follows: “Any relief from the payment of estate duty given by s. 5 (2) or s. 21 (1) of the Finance Act, 1894, shall cease in the case of any person dying after August 15, 1914, and settlement estate duty shall not be levied in the case of persons dying after May 11, 1914.”

(b) The expression “estate duty,” as used throughout the Act, included settlement estate duty, but the latter duty is now abolished by the Finance Act, 1914, s. 14.

(c) The provisions as to collection and recovery of estate duty apply

“(2.) The executor (*d*) of the deceased shall pay (*e*) the Estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit (*f*), and may pay in like manner the Estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor (*g*), or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment (*h*).

“(3.) Where the executor does not know the amount or value of any property which has passed on the death, he may state in the Inland Revenue affidavit that such property exists but he does not know the amount or value thereof, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account thereof, and to pay both the duty for which he is or may be liable, and any further duty payable by reason thereof for which he is or may be liable in respect of the other property mentioned in the affidavit.

“(4.) Estate duty, so far as not paid by the executor, shall be collected upon an account setting forth the particulars of the property, and delivered to the Commissioners within six months after the death by the person accountable for the duty, or within such further time as the Commissioners may allow.

“(5.) Every estate shall include all income accrued upon the

also to increment value duty as a death duty; see sect. 5 of the Finance Act, 1910.

(*d*) The expression “executor” means the executor or administrator of a deceased person, and includes, as regards any *obligation*, any person who intermeddles with the personal property of a deceased person: sect. 22 (1) (*d*). It would seem, therefore, not to include any such person as regards any *power* given to an executor.

(*e*) Estate duty is not, like the original Probate duty, merely a Stamp duty, but is one for which the executor is personally accountable: *Re Kingdon and Wilson*, [1902] 2 Ch. 242, 257.

(*f*) See definition sect. 22 (1) (*n*), and as to form of affidavit, see sect. 8 (14), *post*, p. 751.

(*g*) As to what property comes under the control of the executor by the exercise by Will of a general power of appointment, see *post*, p. 757.

(*h*) In all cases where Estate duty becomes payable for which the executor is not made accountable by this section, the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares: *Re Countess of Orford*, [1896] 1 Ch. 257; *Berry v. Gaukroger*, [1903] 2 Ch. 116. Estate duty payable under sect. 5 (5) is payable out of income and not out of capital: *Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

property included therein down to and outstanding at the date of the death of the deceased.

“(6.) Interest [at the rate of 3 per cent. per annum] on the Estate duty shall be paid from the date of the death up to the date of the delivery of the Inland Revenue affidavit or account, or the expiration of six months after the death, whichever first happens [and shall form part of the Estate duty] (i).

“(7.) The duty which is to be collected upon an Inland Revenue affidavit or account shall be due on the delivery thereof, or on the expiration of six months from the death, whichever first happens.

“(8.) Provided that the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due, less income tax, and the first instalment shall be due at the expiration of twelve months from the death, and the interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly; but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and in case the property is sold, shall be paid on completion of the sale, and if not so paid shall be duty in arrear.

Value of
property.

“7.—(1.) In determining the value of an estate for the purpose of Estate duty allowance shall be made for reasonable funeral expenses (k) and for debts (l) and incumbrances; but an allowance shall not be made—

“(a) For debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest (m), nor

(i) This provision as to interest on Estate duty has been modified by sect. 18 of the Act of 1896. See *post*, p. 756. The words within brackets were repealed by sect. 40 of the Act of 1896.

(k) As to what funeral expenses are allowable to executors and administrators as against creditors, legatees, and next of kin, see *ante*, p. 727 *et seq.*

(l) By sect. 62 of the Act of 1910 an allowance is made under this sub-section for increment value duty as if it were a debt.

(m) In the case of persons dying after 29 April, 1910, a debt or incumbrance cannot be deducted if it was incurred for the purchase, acquisition or extinction of any interest in expectancy in the

“(b) For any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained, nor

“(c) More than once for the same debt or incumbrance charged upon different portions of the estate;

and any debt or incumbrance (n) for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto.

“(2) An allowance shall not be made in the first instance for debts due from the deceased to persons resident out of the United Kingdom (unless contracted to be paid in the United Kingdom, or charged on property situate within the United Kingdom), except out of the value of any personal property of the deceased situate out of the United Kingdom in respect of which Estate duty is paid; and there shall be no repayment of Estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioners, that the personal property of the deceased situate in the foreign country or British possession in which the person to whom such debts are due resides, is insufficient for their payment.

“(3.) Where the Commissioners are satisfied that any additional expense in administering or in realising property has been incurred by reason of the property being situate out of the United Kingdom, they may make an allowance from the value of the property on account of such expense not exceeding in any case 5 per cent. on the value of the property.

“(4.) Where any property passing on the death of the deceased is situate in a foreign country (o), and the Commissioners are satisfied that by reason of such death any duty is payable in that foreign country in respect of that property, they shall make an allowance of the amount of that duty from the value of the property.

“(5) The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such

property, and the person entitled to such interest becomes entitled under the deceased to any interest in that property; see sect. 57 of the Act of 1910, which was enacted to meet the decision in *Att.-Gen. v. Richmond*, [1909] A. C. 466. As to what is an “incumbrance,” see *De Freyne v. I. R. Commrs.*, [1916] 2 Ir. R. 456.

(n) As to meaning of “incumbrances,” see sect. 22 (1) (k); *Re Meyrick*, [1897] 1 Ch. 99.

(o) As to property in British possessions, see sect. 20.

property would fetch if sold in the open market at the time of the death of the deceased (*p*);

“Provided that, in the case of any agricultural property (*q*), where no part of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value as assessed under Schedule A. of the Income Tax Acts, after making such deductions as have not been allowed in that assessment and are allowed under the Succession Duty Act, 1853 (*r*), and making a deduction for expenses of management not exceeding 5 per cent. of the annual value so assessed (*s*).

“(6.) Where an estate includes an interest in expectancy (*t*), Estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the Estate duty in respect of the rest of the estate, then—

“(a) for the purpose of determining the rate of Estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and

“(b) the rate of Estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained (*u*).

“(7.) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

“(a) if the interest extended to the whole income of the property, be the principal value of that property; and

“(b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended (*x*).

(*p*) See sect. 60 (2) of Act of 1910; *A.-G. v. Boden*, [1912] 1 K. B. 539; *Ellesmere v. I. R. Commrs.*, [1918] 2 K. B. 735.

(*q*) As to meaning of “agricultural property,” see sect. 22 (1) (*g*).

(*r*) 16 & 17 Vict. c. 51, s. 22.

(*s*) This proviso has for the most part ceased to have effect; see sects. 60, 61 of Act of 1910.

(*t*) As to meaning of “interest in expectancy,” see sect. 22 (1) (*j*).

(*u*) *Re Eyre*, [1907] 1 K. B. 331; *Re Avery*, [1913] 1 Ch. 208.

(*x*) See *Att.-Gen. v. De Prévillé*, [1900] 1 Q. B. 223; and Finance Act, 1900, s. 11 (1); *Att.-Gen. v. Lord Montagu*, [1904] A. C. 316.

“(8.) Subject to the provisions of this Act, the value of any property for the purpose of Estate duty shall be ascertained by the Commissioners in such manner and by such means as they think fit, and, if they authorize a person to inspect any property and report to them the value thereof for the purposes of this Act, the person having the custody or possession of that property shall permit the person so authorized to inspect it at such reasonable times as the Commissioners consider necessary.

“(9.) Where the Commissioners require a valuation to be made by a person named by them, the reasonable costs of such valuation shall be defrayed by the Commissioners.

“(10.) Property passing on any death shall not be aggregated more than once, nor shall Estate duty in respect thereof be more than once levied on the same death (*y*).

“8.—(1.) The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of Estate duty, and for the exemption of the property of common seamen, marines or soldiers who are slain or die in the service of her Majesty (*z*), and for the purpose of payment of sums under one hundred pounds without requiring representation (*a*), as if such law and practice were in terms made applicable to this part of this Act.

Supplemental provisions as to collection, recovery, and repayment of and exemption from Estate duty.

“(2.) Sects. 12 to 14 of the Customs and Inland Revenue Act, 1889 (*b*), and sect. 47 of the Local Registration of Title (Ireland) Act, 1891 (*c*), shall apply as if Estate duty were therein mentioned as well as Succession duty, and as if an account were not settled within the meaning of any of the above sections until the time for the payment of the duty on such account has arrived.

and consider observations of Vaughan Williams, L. J., in *Att.-Gen. v. Wood*, [1897] 2 Q. B. 102, as to the apparent inconsistency between sect. 2 (1) (*b*), and sect. 7 (7); and see *A.-G. v. Watson*, [1917] 2 K. B. 427.

(*y*) By the Finance Act, 1914, s. 15, relief is given in respect of quick succession where the property consists of land or a business.

(*z*) The property of common seamen, marines or soldiers, who are slain or die in the service of his Majesty is exempt from all Stamp duties. See Finance Act, 1900, s. 14; Death Duties Act, 1914; Finance (No. 2) Act, 1915, s. 46; Finance Act, 1917, s. 29.

(*a*) See *ante*, p. 368. Such estates were exempt from duty by virtue of 27 & 28 Vict. c. 56, s. 5.

(*b*) Pt. III. Bk. III. Ch. IV. § VII.

(*c*) This section charges registered land with Succession duty, and other burdens.

“(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which Estate duty is payable upon the death of the deceased, and shall be accountable for the Estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received.

“(4.) Where property passes on the death of the deceased, and his executor is not accountable for the Estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession (*d*), and also, to the extent of the property actually received or disposed of by him, every trustee (*e*), guardian, committee, or other person

(*d*) *Berry v. Gankroger*, [1903] 2 Ch. 116; *Re Avery*, [1913] 1 Ch. 208, overruling *Re Dixon*, [1902] 1 Ch. 248.

(*e*) By stat. 48 Geo. III. c. 149, s. 35, it is enacted, that “The probate of the Will of any person deceased, or the letters of administration of the effects of any person deceased, &c., &c., shall be deemed and taken to be valid and available by the executors or administrators of the deceased, for recovering, transferring, or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed, or entitled, either wholly or partially, as a trustee, notwithstanding the amount or value of such debt or debts, or other personal estate or effects, or the amount or value of so much thereof, or such interest therein, as was trust property in the deceased (as the case may be) shall not be included in the amount or value of the estate in respect of which the Stamp duty was paid on such probate or letters of administration.”

And by sect. 36 of the same statute, it is provided, that where the executors or administrators of any person deceased shall be desirous of transferring, or of receiving the dividends of any share standing in the name of the deceased, of and in any government or parliamentary stocks or funds, transferable at the Bank of England, or of and in the stock and funds of the Governor and Company of the Bank of England, or of and in the stock and funds of any other company, corporation or society whatever, passing by transfer in the books of such company, corporation, &c., under any such probate or letters of administration, and shall allege that the deceased was possessed thereof, or entitled thereto, either wholly or partially, as a trustee; the Bank and any other corporation, &c., or their officers may, for their indemnity, require an affidavit or affirmation of the fact, as in sect. 37 is mentioned, if it shall not otherwise appear, and thereupon may permit such executors or administrators to transfer the stock or fund in question, and receive the dividends thereof, without regard to the Stamp duty on the probate or letters. And where the executors or administrators of any person deceased shall have occasion to recover any debt or other personal estate due to the deceased, and shall allege that he was possessed thereof, or entitled thereto, either wholly or partially, as a trustee; the person liable to pay such debt, may require a like affidavit as aforesaid, and thereupon make over such debt or

in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title (f) shall be accountable for the Estate duty on the property, and shall, within the time (g) required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property.

“(5.) Every person accountable for Estate duty, and every person whom the Commissioners believe to have taken possession

effects to such executors, &c., regardless of such Stamp duty as aforesaid; and where the executors, &c., of any person deceased shall have occasion to assign or transfer any debts due to the deceased, or any chattels real, or other personal estate, whereof or whereto the deceased was possessed or entitled, and shall allege that the same were due to, or vested in him, either wholly or partially, as a trustee, the person to whom or for whose use such debts, chattels real, &c., shall be proposed to be assigned, may require such affidavit as aforesaid, and thereupon accept such assignment or transfer, regardless of such Stamp duty as aforesaid.

And by sect. 37 of the same statute, upon any requisition as in sect. 36, such executors or administrators, or some person to whom the fact shall be known, shall make a special affidavit or affirmation of the facts, stating the property in question, and that the deceased had not any beneficial interest in the same, or no other than shall be therein set forth, but was possessed of or entitled thereto, wholly or in part, in trust for some other person, whose name or other description shall be specified, or for such purposes as shall be therein specified, and that the beneficial interest of the deceased, if any, in the property in question, does not exceed a certain value, also therein specified, according to the best estimate that can be made thereof, if reversionary or contingent: and that the value of the estate for which the Stamp duty was paid on the probate or letters is sufficient to cover all such beneficial interest, as well as the rest of such personal estate of the deceased, and for which such probate or letters have been granted, as far as the same has come to the knowledge of such executors or administrators; and where such affidavit or affirmation is made by any other person than the executors or administrators of the deceased, they also shall make an affidavit or affirmation that the same is true, to the best of their knowledge, and that the property in question is intended to be applied accordingly: which affidavits or affirmations shall be sworn before a Master in Chancery, and shall be delivered to the party requiring the same, and be sufficient indemnity to them; and if any person making such affidavit or affirmation shall knowingly and wilfully make a false oath or affirmation of the matters therein contained, such persons shall, on conviction, be liable to the pains inflicted on persons guilty of perjury. As to this last section, see Finance Act, 1894, s. 23 (6).

(f) The language of this sub-section would appear to have been taken largely from sect. 44 of the Succession Duty Act, 1853.

(g) *I.e.*, within six months after the death: see sect. 6 (4).

of or administered any part of the estate in respect of which duty is leviable on the death of the deceased, or of the income of any part of such estate, shall, to the best of his knowledge and belief, if required by the Commissioners, deliver to them and verify a statement of such particulars together with such evidence as they require relating to any property which they have reason to believe to form part of an estate in respect of which Estate duty is leviable on the death of the deceased.

“(6.) A person who wilfully fails to comply with any of the foregoing provisions of this section shall be liable to pay 100*l.*, or a sum equal to double the amount of the Estate duty, if any, remaining unpaid for which he is accountable, according as the Commissioners elect: Provided that the Commissioners, or in any proceeding for the recovery of such penalty the Court, shall have power to reduce any such penalty (*h*).

“(7.) Estate duty shall, in the first instance, be calculated at the appropriate rate according to the value of the estate as set forth in the Inland Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty shall, unless a certificate of discharge has been delivered under this Act, be payable, and be treated as duty in arrear (*i*).

“(8.) The Commissioners on application from a person accountable for the duty on any property forming part of an

(*h*) The default must be wilful: *A.-G. v. Till*, [1910] A. C. 50.

(*i*) Sect. 32 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), enacts that: “If at any time it shall be discovered that the personal estate and effects of the deceased were, at the time of the grant of probate or letters of administration, of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit, with an account to the Commissioners of Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest upon such amount at the rate of five pounds per centum per annum from the date of the grant, or from such subsequent date as the said Commissioners may in the circumstances think proper.”

And sect. 40 enacts that: “If any person who ought to obtain probate or letters of administration or deliver a further affidavit or to exhibit an inventory or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of Probate, Legacy, or Succession duties.”

estate shall, where they consider that it can conveniently be done, certify the amount of the valuation accepted by them for any class or description of property forming part of such estate.

“(9.) Where the Commissioners are satisfied that the Estate duty leviable in respect of any property cannot without excessive sacrifice be raised at once, they may allow payment to be postponed for such period, to such extent, and on payment of such interest not exceeding 4 per cent. or any higher interest yielded by the property, and on such terms, as the Commissioners think fit (*k*).

“(10.) Interest on arrears of Estate duty shall be paid as if they were arrears of Legacy duty (*l*).

“(11.) If after the expiration of twenty years from a death upon which Estate duty became leviable any such duty remains unpaid, the Commissioners may, if they think fit, on the application of any person accountable or liable for such duty or interested in the property, remit the payment of such duty or any part thereof or any interest thereon (*m*).

“(12.) Where it is proved to the satisfaction of the Commissioners that too much Estate duty has been paid, the excess shall be repaid by them, and in cases where the over-payment was due to over-valuation by the Commissioners, with interest at 3 per cent. per annum.

“(13.) Where any proceeding for the recovery of Estate duty in respect of any property is instituted, the High Court shall have jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property.

“(14.) All affidavits (*n*), accounts, certificates, statements,

(*k*) Under sect. 56 of the Act of 1910 the Commissioners may accept part of real property in satisfaction of the duty.

(*l*) This section is repealed by the Finance Act, 1896, s. 40. And see sect. 18 of the same Act, *post*, p. 756. Under 52 Vict. c. 7, s. 8 (2), interest at 4 per cent. on arrears of duty was recoverable, but acceptance of arrears with interest was an absolute waiver of penalties.

(*m*) See sect. 13 of Act of 1907. Purchasers and mortgagees are exempted from liability after a specified period, under sect. 8 (2), above.

(*n*) Sect. 29 of the Act of 1881 enacts that: “The affidavit to be required or received from any person applying for probate or letters of administration in England or Ireland shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debt and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the Commissioners of her Majesty’s Treasury; and the Commissioners of Inland Revenue shall provide forms of affidavit stamped to denote the duties payable under this Act.”

The Finance Act, 1900, s. 13 (2), provides that: “The Commissioners

and forms used for the purpose of this part of this Act shall be in such form, and contain such particulars, as may be prescribed (o), and if so required by the Commissioners shall be in duplicate, and accounts and statements shall be delivered and verified on oath and by production of books and documents in the manner prescribed, and any person who wilfully fails to comply with the provisions of this enactment shall be liable to the penalty above in this section mentioned.

“(15.) No charge shall be made for any certificate given by the Commissioners under this Act.

“(16.) The Estate duty may be collected by means of stamps or such other means as the Commissioners prescribe.

“(17.) The form of certificate required to be given by the proper officer of the Court under sect. 30 of the Customs and Inland Revenue Act, 1881. may be varied by a Rule of Court in such manner as may appear necessary for carrying into effect this Act (p).

“(18.) Nothing in this section shall render liable to or accountable for duty a *bonâ fide* purchaser for valuable consideration without notice (q).

Charge of
Estate duty
on property,
and facilities
for raising it.

“9.—(1.) A rateable part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a *bonâ fide* purchaser thereof for valuable consideration without notice (q).

“(2.) On an application submitting in the prescribed (r) form the description of the lands or other subjects of property

of Inland Revenue may, if they think fit, accept a statement by or on behalf of any accountable person as a correction of any Inland Revenue affidavit or account within the meaning of Part I. of the Finance Act, 1894, for the purposes of that Act and the Acts amending that Act, without requiring that statement to be verified on oath.”

(o) *I.e.*, by the Inland Revenue Commissioners. See sect. 22 (1) (o).

(p) Sect. 30 of the Customs and Inland Revenue Act, 1881, is as follows: “No probate or letters of administration shall be granted by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, or by the Probate and Matrimonial Division of the High Court of Justice in Ireland, unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.”

(q) Cf. sect. 11 (4).

(r) Sect. 22 (1) (o).

(whether hereditaments, stocks, funds, shares, or securities), and of the debts and incumbrances (*s*) allowed by the Commissioners in assessing the value of the property for the purposes of Estate duty, the Commissioners shall grant a certificate (*t*) of the Estate duty paid in respect of the property, and specify the debts and incumbrances so allowed, as well as the lands or other subjects of property.

“(3.) Subject to any repayment of Estate duty arising from want of title to the land or other subjects of property, or from the existence of any debt or incumbrance (*s*) thereon for which under this Act an allowance ought to have been but has not been made, or from any other cause, the certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid: Provided that any such repayment of duty by the Commissioners shall be made to the person producing to them the said certificate.

“(4.) If the rateable part of the Estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned (*u*).

“(5.) A person authorized or required to pay the Estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof (*x*).

(*s*) Sect. 22 (1) (*k*).

(*t*) See sect. 8 (15), *ante*, p. 752.

(*u*) If legacies are charged on real estate, the legatees must contribute rateably to the estate duty payable in respect of the real estate; see sects. 8 (4) and 9 (1); *Re Spencer Cooper*, [1908] 1 Ch. 130. Increment value duty payable on leaseholds is payable by the executor, but can be recovered by him from the trustees or owners thereof; see sect. 5 of the Act of 1910. As to repayment of duties paid on foreign personalty, see *Re Scull*, 87 L. J. Ch. 59.

(*x*) The general rule that, in the absence of special circumstances, the tenant for life of a settled estate is bound to keep down the interest on charges on the inheritance, is not affected by the Finance Acts, 1894 and 1896; so that, although under the power given to him by

“(6.) A person having a limited interest in any property, who pays the Estate duty in respect of that property, shall be entitled to the like charge, as if the Estate duty in respect of that property had been raised by means of a mortgage to him (y).”

“(7.) Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882, may be expended in paying any Estate duty in respect of property comprised in the settlement and held upon the same trusts.”

The above sections (sects. 6, 7, 8, 9) make provision for the valuation of property, and for the collection and recovery of Estate duty, and provide facilities for raising such duty on property which does not pass to the executor as such.

The person who has to pay over the duty to the Crown is either the executor under sect. 6 (2), or the persons mentioned in sect. 8 (4). Under sect. 6 (2) the executor *must* pay the Estate duty in respect of all personal property (wherever situate) of which the deceased was competent to dispose at his death, and *may* pay the duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the executor's control, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.

Although his liability to pay the duty to the Crown is limited to the personal property of which the deceased was competent to dispose at his death, the executor must, under sect. 8 (3), specify in the accounts annexed to the Inland Revenue affidavit all the property, real and personal, in respect of which Estate duty is payable on the death of the deceased, whether it is the deceased's property or not.

sect. 9 (5) of the Act of 1894, he may charge the inheritance with instalments of Estate duty payable by him under sect. 6 (8), he cannot also charge it under sect. 9 (5) with the interest on the unpaid portion of the duty unless he can show that such interest has been “properly incurred by him”: *Re Earl Howe's Settled Estates*, [1903] 2 Ch. 69.

(y) *Laurie's Case*, [1898] 2 I. R. 636; *Re Mexborough* (1902), 86 L. T. 331, where a legatee to whom a legacy was given for the express purpose of and not merely with the motive of securing payment thereby of the Estate duty on the testator's estates, was held not to be entitled to recoup himself by means of a charge under this section. The amount of the charge will be part of the personal estate of the chargee and be liable to estate duty: *Ld. Adv. v. Moray*, [1905] A. C. 531.

In *Re Palmer* (z), Buckley, J., held that the language of sect. 9 (1) of the Finance Act, 1894, must be construed with reference to the law as it stood at that time, and not in accordance with the provisions of the Land Transfer Act, 1897, and therefore real estate did not "pass to the executor," and it was charged with a rateable part of the Estate duty. This decision was followed by Kekewich, J., in *Re Sharman* (a). A legacy payable out of real estate falls, therefore, within sect. 9 (1), and where a legacy is payable out of a mixed fund the portion attributable to the proceeds of real estate bears a rateable part of the duty (b).

Real estate does not "pass to the executor" within the meaning of sect. 9 (1).

Where the executor is not accountable for the Estate duty in respect of property which passed on death, sect. 8 (4) provides that every person to whom any property so passed for any beneficial interest in possession, and also to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the Estate duty on the property.

In all cases where Estate duty becomes payable for which the executor is not made accountable under sect. 6 (2), the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares (c). The scheme of the Finance Act, 1894, is that Estate duty on an estate passing on a death is chargeable on the estate as a whole, without regard to tenancies for life or other particular interests, and that it is to be levied on the whole inheritance (d).

Estate duty for which executor is not accountable under sect. 6 (2) must be paid ultimately by persons beneficially entitled.

Where the executor pays the Estate duty, payment is to be made on delivery of the Inland Revenue affidavit (e), and nothing beyond the affidavit is in such case required. When the executor is not liable or does not in fact pay, the duty is

Executor pays Estate duty on delivery of Inland Revenue affidavit;

(z) W. N. (1900) 9.

(a) [1901] 2 Ch. 280.

(b) *Re Spencer Cooper*, [1908] 1 Ch. 130.

(c) In *Re Countess of Orford*, [1896] 1 Ch. 257; *Berry v. Gaukerger*, [1903] 2 Ch. 116, where pecuniary legatees whose legacies were charged upon realty were held liable to contribute to the duty; *Re Charlesworth*, [1912] 1 Ch. 319; *Re Hicklin*, [1917] 2 Ch. 278.

(d) In *Re Parker-Jervis*, [1898] 2 Ch. 643.

(e) Sect. 6 (2).

in other cases
the duty is
collected upon
an account.

collected upon an account setting forth the particulars of the property (*f*).

59 & 60. Vict.
c. 28, s. 18.

The duty is due upon the delivery of the Inland Revenue affidavit or account, or on the expiration of six months from the death, whichever happens first, and simple interest is now payable under sect. 18 of the Finance Act, 1896, which enacts as follows:—

Interest upon
Estate duty
and other
death duties.

“18.—(1.) Simple interest at the rate of 3 per cent. per annum without deduction for income tax shall be payable upon all Estate duty from the date of the death of the deceased, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death, from the date at which the first instalment or the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty.

“(2.) The foregoing provision shall apply to the interest on all death duties as defined by sect. 13 of the principal Act in like manner as if it were herein re-enacted and made applicable to those duties.

“(3.) The Commissioners of Inland Revenue may remit the interest on any of such death duties where the amount appears to them to be so small as not to repay the expense and trouble of calculation and account.”

How the
Estate duty
is to be borne.

Estate duty is to be borne by the estate, both by that portion which passes to the executor, and also by that which does not pass to the executor. But sect. 9 (1) provides that a rateable part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; and by sect. 9 (4) if the rateable part of the Estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property.

It is quite clear that when pecuniary legacies or shares of the residue of a testator's personal estate are given absolutely, the Estate duty must be borne by the general residue, and is not to be paid out of such legacies or shares (*g*): but numerous cases of

(*f*) Sect. 6 (4).

(*g*) The Estate duty on property passing to the executor as such is payable out of the general personal estate, and there is no contribution from legatees either of leaseholds or other personal property specifically bequeathed or of pecuniary legacies, whether settled or un-

difficulty have been taken into the Courts for the purpose of determining how the duty must be borne by different portions of the estate.

Leaseholds being property which by law vests in the executor by virtue of his office, Estate duty upon them is payable out of the testator's general personal estate and is not primarily charged on them under sect. 9 (1) (*h*). But Increment Value duty is so charged under sect. 5 of the Act of 1910.

Leaseholds.

Where a general power of appointment is exercised by Will, the liability to pay the duty has been the subject of conflicting decisions. But it is now settled that where a general power of appointment over a fund is exercised by Will, the appointed fund does not pass to the executor as such, and consequently that Estate duty in respect thereof is payable out of the appointed property (*i*).

Property appointed by Will under a general power.

In *Re Webber* (*k*) it was held that when pecuniary legacies or shares of the residue of a testator's personal estate are settled by his Will, no part of either the Estate duty or the Settlement Estate duty is to be borne by the settled legacies or shares, but the whole of these duties must be borne by the general residue. That case is still an authority in respect of Estate duty, but the law, as to Settlement Estate duty (now abolished) was altered by the Finance Act, 1896, s. 19.

Settled legacies or shares of residue.

All the personal estate wheresoever situate of a testator domiciled in England passes to his "executor as such" within sect. 9 (1), although as to personalty situate abroad he may have to take proceedings in a foreign tribunal to obtain possession of them (*l*).

Foreign chattels.

"11.—(1.) The Commissioners on being satisfied that the full Estate duty has been or will be paid in respect of an estate or any part thereof shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for Estate duty the property shown by the certificate to form the estate or part thereof as the case may be.

Release of persons paying Estate duty.

settled: *Re Culverhouse*, [1896] 2 Ch. 251; *Re Webber*, [1896] 1 Ch. 914; or from annuitants whose annuities are payable out of the deceased's personalty: *Re Trenchard*, [1905] 1 Ch. 82.

(*h*) *Re Culverhouse*, [1896] 2 Ch. 251.

(*i*) *O'Grady v. Wilmot*, [1916] 2 A. C. 231, overruling *Re Hadley*, [1909] 1 Ch. 20.

(*k*) [1896] 1 Ch. 914.

(*l*) *Re Scott*, [1916] 2 Ch. 268.

“(2.) Where a person accountable for the Estate duty in respect of any property passing on a death applies after the lapse of two years from such death to the Commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the Commissioners may determine the rate of the Estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for Estate duty, and the Commissioners shall give a certificate of such discharge (*m*).

“(3.) A certificate of the Commissioners under this section shall not discharge any person or property from Estate duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property in respect of which duty has been already accounted for;

“(4.) Provided nevertheless that a certificate purporting to be a discharge of the whole Estate duty payable in respect of any property included in the certificate shall exonerate a *bonâ fide* purchaser for valuable consideration without notice from the duty notwithstanding any such fraud or failure.

“12. The Commissioners in their discretion, upon application by a person entitled to an interest in expectancy, may commute the Estate duty which would or might, but for the commutation, become payable in respect of such interest for a certain sum to be presently paid, and for determining that sum shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of such duty, and interest being reckoned at 3 per cent.: and on the receipt of such sum they shall give a certificate of discharge accordingly (*o*).

(*m*) See sect. 14 of Finance Act, 1907.

(*n*) See corresponding sections in 36 Geo. III. c. 52, s. 33, Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 11, and Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 43, as to Legacy duty; and as to Succession duty, see 16 & 17 Vict. c. 51, s. 41.

(*o*) See sect. 7 (6), which provides for the payment of duty in respect of an interest in expectancy, either with the duty in respect of the rest of the estate, or when the interest falls into possession: *Re Avery*, [1913] 1 Ch. 208.

Commutation
of duty on
interest in ex-
pectancy (*n*).

“13.—(1.) Where, by reason of the number of deaths on which property has passed or of the complicated nature of the interests of different persons in property which has passed on death, or from any other cause, it is difficult to ascertain exactly the amount of death duties or any of them payable in respect of any property or any interest therein, or so to ascertain the same without undue expense in proportion to the value of the property or interest, the Commissioners on the application of any person accountable for any duty thereon, and upon his giving to them all the information in his power respecting the amount of the property and the several interests therein, and other circumstances of the case, may by way of composition for all or any of the death duties payable in respect of the property, or interest, and the various interests therein, or any of them, assess such sum on the value of the property, or interest, as having regard to the circumstances appears proper, and may accept payment of the sum so assessed, in full discharge of all claims for death duties in respect of such property or interest, and shall give a certificate of discharge accordingly; (p)

Powers to
accept com-
position for
Death duties.

“(2.) Provided that the certificate shall not discharge any person from any duty in case of fraud or failure to disclose material facts.

“(3.) In this section the expression ‘death duties’ means the Estate duty under this Act, the duties mentioned in the First Schedule to this Act and the Legacy and Succession duties, and the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881.

“14.—(1.) In the case of property which does not pass to the executor as such (q) an amount equal to the proper rateable part of the Estate duty may be recovered by the person, who being authorized or required to pay the Estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (r), (whether as capital or as an

Apportion-
ment of duty.

(p) It will be observed that this section gives the Commissioners power to accept compositions for any death duties. Cf. sect. 33 of the Legacy Duty Act, 1796. As to relief in respect of quick succession, see Finance Act, 1914, s. 15; and as to reduction of duty, see *ibid.* s. 13.

(q) It will be seen that this section only applies to property which does not pass to the executor as such. Where property passes to the executor as such, the duty is payable out of the residue.

(r) *Berry v. Gaukroger*, [1903] 2 Ch. 116; *Re Hackett*, [1907] 1 Ch. 385; *Re E. of Stamford*, [1910] 2 Ch. 83; *Re Briggs*, [1914] 2 Ch. 413.

annuity or otherwise,) under a disposition not containing any express provision to the contrary (s).

"(2.) Any dispute as to the proportion of Estate duty to be borne by any property or person, may be determined upon application by any person interested in manner directed by Rules of Court (t), either by the High Court, or, where the amount in dispute is less than 50*l.*, by a County Court for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate.

"(3.) Any person from whom a rateable part of Estate duty can be recovered under this section shall be bound by the accounts and valuations as settled between the person entitled to recover the same and the Commissioners."

Sect. 14 is intended as a protection to the executor or other person who, as between himself and the revenue, has been called upon to pay the Estate duty, has paid it, and looks for recoupment. The legislature has provided that the person who has been required to pay may recover a rateable part of the duty from the person entitled to any sum charged on the property in respect of which duty has been paid. The section does not affect the incidence of the Estate duty in any way (u).

By sect. 1 of the Act of 1910 Increment Value duty at the rate of 1*l.* for every complete 5*l.* of that value is payable on the death of any person after the Act where the fee simple or any interest in land is comprised in the property passing on the death of the deceased within the meaning of sect. 1 and sect. 2 (1) (a), (b), (c) and (3) of the Finance Act, 1894, as amended by any subsequent Act. By sect. 2 the increment value is the amount by which the site value on the occasion on which the duty is to be collected exceeds the original site value and such site value is the principal value as ascertained for the purposes of the Finance Act, 1894. By sect. 5 the provisions of the Act

(s) For instances of express provision to the contrary, see *Re Lord Fitzhardinge*, 80 L. T. 376; *Re Parker-Jervis*, [1898] 2 Ch. 643; *Re Rayer*, [1903] 1 Ch. 685; *Re Coxwell*, [1910] 1 Ch. 63.

(t) An application under this sub-section is to be made by originating summons in the Chancery Division, intituled in the matter of the estate of the person upon whose decease the Estate duty has been paid or claimed, and in the matter of the Finance Act, 1894, and otherwise in the form prescribed by Ord. LIV. r. 4b, and App. K., No. 1A. See Ord. LV. r. 9c; *Re Power* (1899), 47 W. R. 183.

(u) *Re Countess of Orford*, [1896] 1 Ch. 257. See also *Berry v. Gaukroger*, [1903] 2 Ch. 116; *Re Duke of St. Albans*, [1900] 2 Ch. 873; *Re Meyrick*, [1897] 1 Ch. 99; *Re Grey*, [1896] 1 Ch. 620; *Re Webber*, [1896] 1 Ch. 914; *Re Chisholm*, [1902] 1 Ch. 457.

of 1894 as to the assessment, collection and recovery of Estate duty shall apply as if Increment Value duty were Estate duty; but where the interest in land in respect of which Increment Value duty is payable is property passing to the personal representative as such the duty shall be payable out of that interest in land in exoneration of the rest of the deceased's estate and shall be collected on an account to be delivered by the personal representative. By sect. 62 allowance is to be made in determining the value of the estate for the purposes of Estate duty under sect. 7 (1) of the Act of 1894 for the amount of Increment Value duty as if it were a debt.

CHAPTER THE SECOND.

THE PAYMENT OF DEBTS BY THE EXECUTOR OR ADMINISTRATOR
ACCORDING TO THEIR PRIORITY OF DEGREE.

SECTION I.

1. *Payment of the Expenses of the Funeral and of the Probate or Administration.* 2. *Debts due to the Crown.* 3. *Debts to which particular Statutes give Priority of Payment.* 4. *The effect of sect. 10 of the Judicature Act, 1875.*

HAVING considered in a previous part of this Treatise the quantity of the estate of an executor or administrator, it is now necessary to treat of his duty in the application of that estate, according to the order prescribed by the law.

1. Funeral expenses.

1. Before any debt or duty whatsoever, funeral expenses, with the proper limitation as to the amount, are, as it has already appeared (*a*), to be allowed out of the estate of the deceased. These expenses are to be preferred, even to a debt due to the Crown (*b*).

Expenses of probate, &c.

The next thing to justify and occasion expense is the proving of the Will or taking out administration (*c*): but a greater disbursement will not stand allowable, than is prescribed by the statute of 21 Hen. VIII. c. 5 (*d*).

Costs of administration suit.

The costs of an action in Chancery are to be considered as

(*a*) *Ante*, p. 727 *et seq.*

(*b*) *R. v. Wade*, 5 Price, 627, by Richards, C. B.

(*c*) 2 Black. Comm. 511.

(*d*) Wentw. Off. Ex. 14th edit. 260. "St. Germaine (the author of the Doctor and Student, dial. 2, c. 10), who was no stranger to the canon and civil law, as appears by his book, saith, that the Ordinary ought to take nothing for probate, if the goods suffice not for funeral and debts; but he means only that conscience is against it." With respect to the proper fees for probate and letters of administration, see Burn's Eccles. Law, 9th edit. vol. 2, p. 270, *o*, *p*, *q*, *r*.

expenses in administering the estate, and are the first charge upon an estate, whether administered in or out of Court (e).

Where a Will contains a direction that the testator's "testamentary expenses" shall be paid out of a specified part of his estate, the costs of an administration suit are included under testamentary expenses (f).

Testamentary expenses.

There is no distinction between "executorship expenses" and "testamentary expenses" as regards what the phrase includes (g).

The terms "executorship expenses," "testamentary expenses" and "administration expenses" are synonymous expressions and mean expenses incident to the proper performance of the duty of an executor or administrator, and include, besides probate expenses, the costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of their testator's estate: also the costs of the executors and other parties in an action, whether instituted by the executors themselves, or by a beneficiary, for the administration of the testator's personal estate: also the testator's funeral expenses: also expenses incurred by the executors for the protection of specific legacies, *e.g.*, for warehousing furniture specifically bequeathed pending the distribution of the assets: and payment by the executors in discharge of debts falling due from the testator's estate after his death, *e.g.*, rent due after the testator's death for a house of which he was tenant from year to year (h): The term "testamentary expenses" does not include

Executorship expenses.

(e) *Loomes v. Stotherd*, 1 Sim. & Stu. 461, by Sir J. Leach; *Tippling v. Power*, 1 Hare, 405, 411; *Gawnt v. Taylor*, 2 Hare, 413; *Newbegin v. Bell*, 23 Beav. 386; *Sanderson v. Stoddart*, 32 Beav. 155. And this priority will be allowed even over costs of litigation in the Probate Court incurred in determining which is the testator's Will, and ordered by the latter Court to be paid out of the estate: *Major v. Major*, 2 Drewr. 281; *Re Mayhew*, 5 C. D. 596. An order on the further consideration of an action that the costs of all parties are to be paid out of a fund in Court does not amount to a direction that they are to be paid equally. If the fund turns out insufficient to pay all the costs, the costs of administrators must be paid in priority to those of other parties: *Re Griffith*, [1904] 1 Ch. 807; and see *post*, Pt. v. Bk. II. Ch. II.

(f) *Miles v. Harrison*, L. R. 9 Ch. 316; *Harloe v. Harloe*, L. R. 20 Eq. 471; *Penny v. Penny*, 11 C. D. 440; *Re Buckton*, 2 Ch. at 414. The phrase "legal expenses" includes the cost of an administration suit: *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Row v. Row*, L. R. 7 Eq. 414.

(g) *Sharp v. Lush*, 10 C. D. 468, 470, by Jessel, M. R.

(h) *Ibid.*; *Re Clemow*, [1900] 2 Ch. 182, 190. As to when the costs of an inquiry as to the members of a class are testamentary expenses, see *Re Vincent*, [1909] 1 Ch. 810. As to the meaning of "all expenses

the plaintiff's costs of an unsuccessful action impeaching the validity of a Will, though ordered by the judge of the Probate Division to be paid out of the testator's estate (*i*): but it will cover the costs of an action in the Probate Division successfully brought for obtaining a grant of administration: also estate duty payable in respect of personal property of which a testatrix was competent to dispose at her death (*j*): but not Estate duty payable in respect of an appointed fund (*k*): nor Estate duty payable in respect of a *donatio mortis causâ* (*l*): or in respect of real estate where a testatrix dying after the Land Transfer Act, 1897, directed her testamentary expenses to be paid out of her personal estate (*m*): nor Settlement Estate duty (*n*). It seems, however, in such cases, to be immaterial whether testamentary expenses are directed to be paid out of personal estate since such a direction does but state what the law implies (*o*).

The Land Transfer Act, 1897, has not altered the settled practice of the Chancery Division that the costs of an administration action, so far as increased by the administration of the real estate, are to be borne by that real estate (*p*), and this is so though there is a direction to pay testamentary expenses out of personal estate (*q*).

2. Payment of debts.

Rules of priority.

2. The third occasion of disbursement by the executor or administrator is the payment of debts; and in such payment he must be careful to observe the rules of priority; for if he pay those of a lower degree first, he must, on a deficiency of assets, answer those of a higher out of his own estate (*r*). So an executor or administrator is *bound* to plead a debt of a higher

incident to the trust," see *Re Briscoe*, [1910] W. N. 251. As to fees of the Public Trustee, see *Re Hicklin*, [1917] 2 Ch. 278.

(*i*) *Re Prince*, [1898] 2 Ch. 225; *Re Vickerstaff*, [1906] 1 Ch. 762.

(*j*) *Re Clemow*, [1900] 2 Ch. 182; *Re Fearnside*, [1903] 1 Ch. 250; *Re Avery*, [1913] 1 Ch. 208; *Re Massey*, 122 L. T. 676.

(*k*) *O'Grady v. Wilmot*, [1916] 2 A. C. 231; or unappointed fund: *Porte v. Williams*, [1911] 1 Ch. 188.

(*l*) *Re Hudson*, [1911] 1 Ch. 206.

(*m*) *Re Sharman*, [1901] 2 Ch. 280; and see *Re Trenchard*, [1905] 1 Ch. 82.

(*n*) *Re King*, [1904] 1 Ch. 363. In *Re Pimm*, [1904] 2 Ch. 345, a direction to pay out of residue "debts, funeral and testamentary expenses and duties," was held to include the settlement estate duty and estate duty payable in respect of the specifically devised realty. See *Re Briggs*, [1914] 2 Ch. 413.

(*o*) *Re Orlebar*, [1908] 1 Ch. 136.

(*p*) *Re Jones*, [1902] 1 Ch. 92.

(*q*) *Re Betts*, [1907] 2 Ch. 149.

(*r*) 2 Black. Comm. 511.

nature in bar of an action brought against him for a debt of inferior degree, and *riens ultra*, if he has not assets for both; otherwise it will be an admission of assets to satisfy both debts (s).

It is obvious that it is beyond the power of a testator to disappoint the rules of law as to the precedence of debts, by directing his executors to make an equal distribution of the assets among all his creditors (t).

A question of no little difficulty is raised in Story's Conflict of Laws, § 524, viz., Suppose a debtor dies domiciled in England, and leaves assets in a foreign country by the law of which all debts stand in an equal rank, and administration is duly taken out in the place of his domicile, and also in the place of the *situs* of the assets. What rule is to govern in the administration of the assets? The law of the domicile? or the law of the *situs*? That eminent writer states his own opinion to be (in accordance with the decisions of the American Courts, though at variance, as he admits, with that of many foreign jurists), that in regard to creditors the administration of assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them.

With respect
to foreign
assets.

But in the case of *Wilson v. Lady Dunsany* (u), the Master of the Rolls (Sir J. Romilly) declined to adopt this opinion, and held that the personal assets of a testator must be administered on the principle of the law of his domicile. In that case the testator had died domiciled in Ireland, leaving personal assets partly there and partly in England; and, a question having arisen as to the priority of the claims of his creditors, his Honor laid it down that he must treat the case in the same way as if he were sitting in the Court of Chancery in Dublin. In *Cook v. Gregson* (v), where the testator had also died domiciled in Ireland, leaving assets both in Ireland and England, and the same executors in both countries, it was held by Kindersley, V.-C., that an Irish judgment had priority over English simple contract creditors, as against Irish assets remitted to England by the executors and being there administered: His Honor said that if the executors in the two countries had been different

(s) *Rock v. Leighton*, 1 Salk. 310; 1 Saund. 333 a, note (8).

(t) *Turner v. Cox*, 8 Moo. P. O. 288.

(u) 18 Beav. 293.

(v) 2 Drewr. 286.

persons, the duty of each would have been first to pay the debts owing in the country in which he was executor, and then he might send any surplus to the other country; and that the duty of the Irish executor was to pay the Irish debts first, according to their order of priority; and that, therefore, the Irish assets remitted here ought to be administered here as if they had remained and were being administered in Ireland.—It will be observed that in this case the Irish judgment creditor only sought to touch the Irish assets: And therefore it was unnecessary to apply the law as laid down by the Master of the Rolls in *Wilson v. Lady Dunsany*: But the observations of the V.-C. appear to put the question as though it were rather dependent on the *situs* of the assets than on the domicile of the deceased (*w*).

The view of the Vice-Chancellor seems to be the right one. Thus in the late case of *Re Klæbe* (*x*), it is laid down that if a man dies domiciled in England possessing assets in France, the French assets must be collected in France and distributed according to the law of France. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the *lex fori* and for no other reason. But if it should happen that a man died domiciled in France leaving assets in England, those assets can only be collected under an English grant of administration, and being so collected, must be distributed according to the law of England . . . the rule is, that all creditors are to be treated equally, subject to what priorities the law may give them, from whatever part of the world they come. In that case Pearson, J., after referring to the cases of *Cook v. Gregson* (*y*), *Eames v. Hacon* (*z*), and *Blackwood v. The Queen* (*a*), so far as such cases bear upon this question, concludes his judgment by saying,

(*w*) See *Carron Iron Co. v. Maclaren*, 5 H. L. C. 455, 456, by Lord St. Leonards. And this view is borne out by the observations of Mr. Westlake in his work on Private International Law, 3rd edit., sect. 110, where he says that “every administrator, principal or ancillary must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued, or out of it, and whether, owing to creditors domiciled or resident in that jurisdiction, or out of it, in that order of priority which, according to the nature of the debts or of the assets, is prescribed by the laws of the jurisdiction from which the grant issued.”

(*x*) 28 C. D. 175.

(*y*) 2 Drewr. 286.

(*z*) 18 C. D. 351.

(*a*) 8 App. Cas. 92.

"There seems to be some mistake in the case of *Wilson v. Lady Dunsany* (b): it is unfortunate that the case was ever reported."

It should be observed, that by the constant rule of the Chancery Division, a solicitor, in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of the sum decreed or fund recovered for the plaintiff, and a lien upon it, before the specialty and simple contract creditors of the deceased plaintiff; neither can his executor or administrator controvert this rule, by insisting upon applying the assets in a course of administration (c).

Priority of
solicitor's
lien.

To all other debts of whatever nature, as well of a prior as of a subsequent date, such as are due to the Crown by record or specialty, claim the precedence (d). So that if there be not come to the executor or administrator goods of greater value than will suffice for the satisfaction of these, he is not to pay any debt to a subject: and if he be sued for any such, he may plead in bar of this suit that his testator or intestate died thus much indebted to the king, showing how, &c., and that he hath not goods surmounting the value of that debt (e).

Debts due to
the Crown.

But the debts due to the Crown, which are so privileged, are confined to such as are due by matter of record or by specialty, &c. (f) (which are of the same nature; for by stat. 33 Hen. VIII. c. 39, it is enacted, that all obligations and specialties, taken to the use of the king, shall be of the same nature as a statute staple). And, therefore, sums of money owing to the king on wood sales, or sales of tin, or other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record (g). So, though fines and amercements in the King's Court of Record are clearly debts of record (h), and entitled to such preference, yet amercements in the King's Court Baron, or Courts of his Honors, which are not

(b) 18 Beav. 293.

(c) *Lloyd v. Mason*, 4 Hare, 132; *Bulley v. Bulley*, 8 C. D. 479; cf. *Re Turner*, [1907] 2 Ch. 539.

(d) *Magna Charta*, c. 18; 2 Inst. 32; *Littleton v. Hibbins*, Cro. Eliz. 793; Swinb. Pt. 6, s. 16; Wentw. Off. Ex. 261, 14th edit.; Com. Dig. Admon. (C. 2).

(e) Wentw. Off. Ex. 261, 14th edit.; Godolph. Pt. 2, c. 28, s. 3.

(f) Wentw. Off. Ex. 262, 14th edit.; Godolph. Pt. 2, c. 28, s. 3; Com. Dig. Admon. (C. 2).

(g) *Ibid.*; 3 Bac. Abr. 79, 80, tit. Exors. (L.) 2.

(h) Godolph. Pt. 2, c. 28, s. 3.

of record, have no such priority (*i*): nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties: for these are not debts of record (*j*).

So, also, the arrears of rent due to the Crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, shall, it appears, be regarded in the light of a debt by simple contract (*k*).

Again, it was held, that a recognizance in the Court of Chancery by a guardian in the matter of a minor, is not to be considered a debt due to the Crown (*l*).

But it seems, that if the king's debt, and likewise that of a subject, be both inferior to debts of record, the king shall be preferred (*m*).

By stat. 55 Geo. III. c. 184, s. 45, the commissioners of stamps are authorized, in certain cases, to give credit for the duties on probates and administration; and by s. 48, it is provided, that the duty for which credit shall be so given shall be a debt to the Crown, and shall be paid in preference to any other debt whatsoever.

In the administration of assets the position of the Crown resembles more closely that of an executor seeking to retain his debt (*n*) than that of a simple contract creditor who has recovered judgment against the legal personal representative. Consequently having regard to Hinde Palmer's Act, 1869 (32 & 33 Vict. c. 46), which abolished the distinction between specialty and simple contract creditors for purposes of payment, the assets ought first to be apportioned rateably between the specialty and simple contract debts, and the Crown debt ought then to be taken out of the amount apportioned to the simple contract debts (*o*).

Sect. 33 of the Bankruptcy Act, 1914, does not apply to the administration of an estate out of Court. It does not therefore deprive Crown debts of priority given to them by the common law (*p*).

(*i*) Wentw. Off. Ex. 263, 14th edit.; Com. Dig. Admon. (C. 2); 3 Bac. Abr. 80, tit. Exors. (L.) 2.

(*j*) *Ibid.*

(*k*) Com. Dig. Admon. (C. 2); Wentw. Off. Ex. 264, 14th edit.; but see *post*, p. 783.

(*l*) *Ex parte Usher*, 1 Ball & Beat. 199.

(*m*) Bac. Abr. *ubi supra*, n. (*u*).

(*n*) *Post*, p. 797.

(*o*) *Re Bentinck*, [1897] 1 Ch. 673. Simple contract debts can now be paid in preference to specialty debts in the case of insolvent estates: *Re Samson*, [1906] 2 Ch. 584, overruling *Re Hankey*, [1899] 1 Ch. 541, on this point.

(*p*) *Re Laycock*, [1919] 1 Ch. 241.

3. Next in order are certain specific debts, which are, by particular statutes, to be preferred to all others. Such were formerly forfeitures for not burying in woollen under the statute of Charles, now repealed by stat. 54 Geo. III. c. 108; and such were debts for letters, not exceeding 5*l.*, to the Post Office (*q*).

3. Debts to which particular statutes give priority :

Again, by stat. 17 Geo. II. c. 38, s. 3, it is enacted, that if any overseer shall die before the expiration of his office, “his executors or administrators shall, within forty days after his decease, deliver over all things concerning his office to some churchwarden, or other overseer of the same place: and shall pay out of the assets left by such overseer all sums of money, remaining due, which he received by virtue of his said office, *“before any of his other debts are paid and satisfied.”*

money due to parish by overseers of the poor.

Likewise, it was provided by stat. 33 Geo. III. c. 54, s. 10 (*r*), that if any person appointed to any office by any Friendly Society, and having in his hands any money, or effects or securities belonging to the same, shall die, or become a bankrupt or insolvent, his executors, administrators, or assignees shall pay out of the assets of such person all sums remaining due, which such person received by virtue of his said office, before any of his other debts are paid.

Officers of a Friendly Society.

This provision of the statute preferring the claim of Friendly Societies to those of all other creditors would seem not to have been favoured (*s*): it was held to be confined to persons duly and formally appointed officers of the society; and that it did not extend to any person to whom the money of the society had been paid as banker, or to whom the money had been lent upon security, paying interest (*t*). And money *lent* to any officer of the society duly appointed, or suffered to remain in his hands upon giving security, was determined not to be within the preference given by the Act; the preference being given only in respect of money which got into the hands of officers independent of contract (*u*).

(*q*) 9 Ann. c. 13, s. 30; 2 Black. Comm. 511. Repealed by the stat. 1 Vict. c. 32.

(*r*) Repealed by the stat. 10 Geo. IV. c. 56.

(*s*) See the remarks of Lord Eldon in *Ex parte Ross*, 6 Ves. 804; *Ex parte Stamford Society*, 15 Ves. 281.

(*t*) *Ex parte Lancaster Society*, 6 Ves. 98; *Ex parte Ashley*, 6 Ves. 441; *Ex parte Corser*, *ibid.*; *Ex parte Ross*, 6 Ves. 802.

(*u*) *Ex parte Stamford Society*, 15 Ves. 280; *Ex parte Buckland*, Buck. 214.

Notwithstanding, however, the censures which this enactment met from eminent judges, it has, in substance, been continued in the subsequent Friendly Societies Acts, and is contained in that now in operation (59 & 60 Vict. c. 25, s. 35) (*v*).

By the Savings Banks Act, 1863 (*w*), s. 14, moneys due from a deceased officer of a savings bank to the bank shall be paid before his other debts.

By the Regimental Debts Act, 1893 (56 Vict. c. 5), which repealed the earlier Act of 1863, special and minute provisions are made for the preferential payment of regimental debts, and the distribution of the effects of officers and soldiers in case of death.

Another instance may be adduced in the case of money due from the deceased as treasurer or collector to paying commissioners under the Metropolis Act, 57 Geo. III. c. 29, s. 51 (local Act), by which it was enacted, that the executors or administrators, &c., of any treasurer, collector, or other officer, &c., should out of the estate and effects pay the commissioners, &c., all such sums of money as had been collected by the deceased, and due to the commissioners, in preference to any other debt or debts (*except debts due to the king's majesty*).

By the Workmen's Compensation Act, 1906, s. 5 (3), the amount due in respect of compensation, not exceeding in any individual case the sum of £100, is included amongst the debts having priority under the Preferential Payments in Bankruptcy Act, 1888 (*x*).

It may here be observed that the words of these Acts are very large, sufficient, as it seems, to give to the debts, which are the subject of them, precedence to those due to the Crown: but, perhaps, they would not be so construed (*y*).

4. It may be convenient here to notice an important provision in section 10 of the Judicature Act, 1875. Prior to that Act the rules applied by the Court of Chancery in administering an insolvent estate differed in many respects from those applied by the Court of Bankruptcy. In particular, secured creditors were entitled to a dividend on the full amount of

(*v*) *Re Eilbeck*, [1910] 1 K. B. 136, following *Re Miller*, [1893] 1 Q. B. 59.

(*w*) 26 & 27 Vict. c. 87; and see Bankruptcy Act, 1914, s. 33 (9).

(*x*) See now Bankruptcy Act, 1914, s. 33 (1d), *infra*.

(*y*) 6 Ves. 99, by Lord Alvanley, in *Ex parte The Lancaster Society*; see *Re Laycock*, *supra*.

Regimental
debts.

Treasurer,
&c. to paying
commis-
sioners.

Whether
these debts
have pre-
cedence of
the Crown.

Judicature
Act, 1875,
s. 10.

Administra-
tion by the
Court of an
insolvent
estate:
rules in
bankruptcy
to apply.

their debts, and voluntary bonds were postponed to other debts, whereas in the Court of Bankruptcy secured creditors only proved for the balance after valuing their securities, and all creditors, including judgment creditors, were paid rateably (z). Section 10 of the Judicature Act, 1875, provides that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable; and as to the valuation of annuities, and future, and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such Company, may come in under the decree or order for the administration of such estate, or under the winding up of such Company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

It was held in *Re Maggi* (a), that this section did not introduce into the administration of insolvent estates of deceased persons the provisions of sect. 32 of the Bankruptcy Act, 1869 (now replaced by the similar sect. 33 (7) of the Bankruptcy Act, 1914), that all debts, with certain exceptions, are to be paid *pari passu*, but affected only the rights of the class of secured creditors as conflicting with those of the class of unsecured creditors, and did not affect the rights *inter se* of the members of those classes. This decision, however, after being questioned in *Re Leng* (b), was disapproved by the Court of Appeal in *Re Whitaker* (c), in which case it was held that the section has

(z) See *per* Cozens-Hardy, J., in *Re Whitaker*, [1900] 2 Ch. at p. 677.

(a) 20 C. D. 545. Cf. also *Re Stubbs*, 8 C. D. 154; *Re Williams*, L. R. 15 Eq. 270.

(b) [1895] 1 Ch. 652.

(c) [1900] 2 Ch. 676; [1901] 1 Ch. 9.

the effect of introducing into the administration of the estates of deceased insolvents by the Chancery Division the rule in bankruptcy that voluntary creditors are to be paid *pari passu* with creditors for value.

Query, whether sect. 10 affects Crown's priority.

It is doubtful whether the section imports into administration proceedings in Court so much of the Bankruptcy Act, 1883, as relates to the Crown's priority (*d*).

The section applies to an estate of a deceased person which is sufficient for the payment in full of his debts and liabilities apart from costs of administration, but becomes insufficient by reason of such costs (*e*).

Preferential Payments in Bankruptcy Act, 1888.

The doubtful question whether debts entitled to priority in bankruptcy were to be treated as entitled to a similar priority in administering the assets of a deceased insolvent was set at rest by sect. 1, sub-sect. 6, of the Preferential Payments in Bankruptcy Act, 1888 (*f*). The priority as to rates and wages conferred by this Act applies only in the case of a deceased insolvent

(*d*) *Re Oriental Bank Corporation, Ex parte The Crown*, 28 C. D. 643, 649. See also the observation of Jessel, M. R., in the *Mersey Steel & Iron Co. v. Naylor*, 9 Q. B. D. 648, 662; *Re Laycock*, [1919] 1 Ch. 241.

(*e*) *Re Leng, ubi supra*.

(*f*) 51 & 52 Vict. c. 62, replaced by Bankruptcy Act, 1914, s. 33 (1). The Act of 1914 provides for the payment in priority to all other debts of—(a) "All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property, or income tax assessed on the bankrupt up to the 5th day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment. (b) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding 50*l.*; and (c) All wages of any labourer or workman not exceeding 25*l.*, whether payable for time or for piece-work, in respect of services rendered to the bankrupt during two months before the date of the receiving order: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority for the whole of such sum, or a part thereof, as the Court may decide to be due under the contract proportionate to the time of service up to the date of the receiving order." (d) All amounts not exceeding in any individual case 100*l.* due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the date of the receiving order, subject, nevertheless, to the provisions of sect. 5 of that Act; and (e) All contributions payable under the National Insurance Act, 1911, by the bankrupt in respect of employed contributors or workmen in an insured trade during four months before the date of the receiving order. And (5): "This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order."

whose estate is being administered in the Chancery Division, where the date of his death occurs after the commencement of the Act (*g*).

Sect. 130 of the Bankruptcy Act, 1914, provides for the administration in bankruptcy of the insolvent estate of a deceased debtor, upon the petition of a creditor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive, and that notice to the legal representative of a deceased person of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed equivalent to a notice of an act of bankruptcy.

Administra-
tion in bank-
ruptcy of
insolvent
estates.

When a member of a partnership dies insolvent and an order is made under sect. 130 of the Bankruptcy Act, 1914, for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the Court has jurisdiction to direct the proceedings in the two estates to be consolidated (*h*).

SECTION II.

Payment of Debts of Record—1. *Judgments.* 2. *Decrees.*
3. *Statutes and Recognizances.*

Next in priority, in the order prescribed for payment of debts, come those which are debts of record (*i*). And debts of this nature are of two sorts, to which belongs a subdivision of precedence.—1. Judgments in Courts of Record; 2. Recognizances and statutes.

Judgments in Courts of Record (*j*), whether obtained compulsorily against the testator or intestate, or confessed by him, are in a precedent degree, not only to all debts, but to recognizances and statutes (though the latter are also debts of record), and must be preferred by the executor or administrator, whether prior in point of time or not (*k*). Therefore, he

1. Judg-
ments:
their prece-
dence to re-
cognizances
and other
debts of
record, as well
as to special-
ties.

(*g*) *Re Heywood*, [1897] 2 Ch. 593; *Re Laycock*, [1919] 1 Ch. 241.

(*h*) *Re Greaves*, [1904] 2 K. B. 493.

(*i*) Wentw. Off. Ex. 265, 14th edit.

(*j*) I.e., judgments docketed or entered according to the statutes now in force. See *infra*.

(*k*) Wentw. Off. Ex. 266, 270, 14th edit.; 1 Roll. Abr. 926; Exors. (R.), pl. 1, 2.

must discharge a later or more puisne judgment in preference to a statute or recognizance in time preecedent (*l*).

What sort of judgments are entitled to this precedence:

The next consideration is, what shall be considered judgments, so as to be entitled to this precedence. The privilege is not confined to judgments of the Supreme Court of Judicature, but extends itself to judgments in all other Courts of Record.

must be entered up against the testator or intestate.

A judgment, which is entered up against the testator or intestate after his death, when that happens between verdict and judgment (*m*), shall be considered as if entered up in his lifetime, and entitled to priority of payment by his executors or administrators accordingly (*n*). But where his death happens between interlocutory and final judgment, it is otherwise; for such judgment is not to be entered against the testator or intestate, but against his executor or administrator (*o*). And it is the same where the death happens after the writ of inquiry is executed, and before final judgment (*p*). Where, however, between the trial of an action and the delivery of judgment one of the defendants dies, the Court has jurisdiction to date the judgment as of the last day of the trial (*q*).

Formerly, a judgment signed after the testator's death, at any time during the term in which he died, or the subsequent vacation, was, by relation, a judgment of the first day of the term (*r*), and therefore it was considered that, if the defendant died after the first day of the sittings and before the trial, the case was within the remedy of the stat. 17 Car. II. c. 8 (*s*). But now, by R. S. C. 1883, Ord. XLI. r. 3, it is provided that where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or a

(*l*) Wentw. Off. Ex. 267, 14th edit.

(*m*) R. S. C. Ord. XVII. r. 1, which on this point is founded on sect. 139 of the Common Law Procedure Act, 1852, which was a re-enactment of 17 Car. II. c. 8, s. 1, now repealed.

(*n*) *Burnet v. Holden*, 1 Lev. 277; *Colebeck v. Peck*, 2 Lord Raym. 1280. It is presumed that these cases, which were decided on 17 Car. II., will be authorities on the construction of the latter portion of Ord. XVII. r. 1, notwithstanding the words of Ord. XLI. rr. 3, 4, which are to the same effect as r. 56 of the Rules of Hilary Term, 1853.

(*o*) *Weston v. James*, 1 Salk. 42; 2 Saund. 72 *v*, 6th edit.; 1 Com. Dig. Pleader (2 D. 9); *Smith v. Eyles*, 2 Atk. 386, by Lord Hardwicke.

(*p*) *Goldsworthy v. Southcott*, 1 Wils. 243.

(*q*) *Turner v. L. & S. W. Rail. Co.*, L. R. 17 Eq. 561; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554.

(*r*) *Bragner v. Langmead*, 7 Term Rep. 20.

(*s*) *Jacobs v. Miniconi*, 7 T. R. 31.

judge shall otherwise order, and the judgment shall take effect from that date: Provided that by special leave of the Court or judge a judgment may be ante-dated or post-dated. And by rule 4 it is provided, that in all cases not within rule 3, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that day (*t*).

A judgment in a foreign country is considered, in our Courts, merely as a debt by simple contract (*u*). And it is settled that an Irish judgment is not, since the Union, entitled to priority as an English judgment (*x*).

What are not entitled to precedence.

A judgment against the executor or administrator himself is not to be considered within the same class as those which are recovered against the deceased (*y*). Such a judgment stands altogether on a different footing. It may be briefly stated in this place, that, with respect to other creditors of the deceased, a creditor, who has obtained a judgment against the executor, has no priority, except with regard to debts of equal degree with that upon which he has obtained judgment. Among such, his debt is allowed the precedence, because it is said the executor ought to pay that creditor first who uses the first diligence (*z*). This priority is of importance in restricting the executor's power of preference (*a*) and his right of retainer (*b*). The executor may therefore plead in bar to an action by a simple contract creditor that there is a judgment unsatisfied which another simple contract creditor has obtained against him, the executor, and that it will exhaust the assets to satisfy that judgment. But such a plea is not allowable in an action by a creditor of superior degree, as upon a bond of which the executor had notice, or a

Effect of judgments against executors.

(*t*) See *ante*, p. 675.

(*u*) *Dupleix v. De Roven*, 2 Vern. 540; *Walker v. Witter*, Dougl. 1.

(*x*) *Harris v. Saunders*, 4 B. & C. 411; *Ferguson v. Mahon*, 11 A. & E. 179, that is, no priority against English assets: for a foreign judgment would be allowed on an administration here, any priority which it had by the law of the country under whose grant foreign assets have been remitted to England. See *ante*, p. 765.

(*y*) Wentw. Off. Ex. 270, 14th edit.

(*z*) *Ashley v. Boccock*, 3 Atk. 208; *Dollond v. Johnson*, 2 Sm. & Giff. 301. But liberty to sign judgment under Ord. XIV. r. 1, is not equivalent to signing or entry of judgment, so as to give a judgment creditor's right of priority to a plaintiff who has failed to follow up the order by signing judgment under Ord. XLI. before the judgment in an administration action: *Re Gurney*, [1896] 2 Ch. 863.

(*a*) See *post*, p. 793.

(*b*) See *post*, p. 797.

judgment which had been docketed or entered (*c*). It must, however, be observed that, as between the executor himself and the creditor who had obtained judgment against him, such judgment (except in the instance of judgment of assets *in futuro*) must be satisfied, at all events, without reference to the state of the assets or the claims of superior creditors; for if the estate of the deceased is insufficient to satisfy it, the executor may be compelled to do so *de bonis propriis* (*d*).

Stat. 23 & 24
Vict. c. 38,
s. 3: judgments not
docketed to
have no
priority.

It was enacted by sect. 3 of the stat. 23 & 24 Vict. c. 38 (*e*) (which has been held, in conformity with the case of *Gaunt v. Taylor* (*f*), decided on 4 & 5 W. & M. c. 20, to apply only to judgments against the testator or intestate, and not to judgments obtained against the executor or administrator (*g*)), "that no judgment which has not already been or which shall not hereafter be entered or docketed under the several Acts now in force (*h*), and which passed subsequently to the said Act of the 4th & 5th W. & M. c. 20, so as to bind lands, tenements or hereditaments as against purchasers, mortgagees or creditors, shall have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates."

This statute applies equally to judgments of County Courts as to other judgments (*i*).

An unregistered judgment obtained against a testator or intestate ranks only as a simple contract debt (*j*).

Stat. 23 & 24
Vict. c. 38,
s. 4: judgments as
against heirs
and executors
to be registered.

By the 4th section of the same statute it was enacted, that no judgments, which since the passing of the stat. 1 & 2 Vict. c. 110, had been registered under the provisions therein contained, or contained in the later Act 2 & 3 Vict. c. 11 (as

(*c*) See *infra*.

(*d*) See *post*, Pt. I. Bk. II. Ch. I.; *Abbis v. Winter*, 3 Swanst. 579, n.

(*e*) Repealed by Land Charges Act, 1900.

(*f*) 3 M. & Gr. 886.

(*g*) *Jennings v. Rigby*, 33 Beav. 198. By 4 & 5 W. & M. c. 20, judgments not docketed were not to have any preference against executors, &c. in the administration of assets. The 2 & 3 Vict. c. 11, closed the docket. It was held that the old law was thereby revived, and that an administrator had committed a *devastavit* by paying a simple contract debt before a judgment debt, even though he had no actual notice of the latter: *Fuller v. Redman*, 26 Beav. 600.

(*h*) Viz., Stat. 1 Vict. c. 110, s. 19; Stat. 2 & 3 Vict. c. 11; Stat. 3 & 4 Vict. c. 82, and Stat. 18 & 19 Vict. c. 15. See now Land Charges Act, 1900, *infra*.

(*i*) *Re Turner*, 33 L. J. Ch. 232.

(*j*) *Van Gheluive v. Nerinckx*, 21 C. D. 189, and see *post*, p. 793.

explained and amended by the stat. 18 & 19 Vict. c. 15), or which thereafter should be so registered, "shall have any preference against heirs, executors or administrators in their administration of their executors' [*i.e.*, ancestors' *semble*], testators' or intestates' estates, unless at the death of the testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorized to be made in manner directed by the said Act of 2 & 3 Vict. (as explained and amended by the stat. 18 & 19 Vict.): but it shall be deemed sufficient to secure such preference as aforesaid, if such a memorandum as was required in the first instance is again left with the Senior Master of the Common Pleas [now with the Central Office of the Supreme Court] within five years before the death of the testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left; and so *toties quoties* upon every re-registry."

By sect. 5, "In the construction of the previous provisions Sect. 5. the term 'judgment' shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment."

It has been held that the 4th section of this statute (above stated) is not retrospective (*k*).

The statute 2 & 3 Vict. c. 11, s. 4, directs, that all judgments registered pursuant to the provisions of the stat. 1 & 2 Vict. c. 110, shall, after the expiration of five years from the former registration, unless re-registered within that time, "be null and void against lands, tenements, and hereditaments as to purchasers, mortgagees, or *creditors*." It was held by Wood, V.-C., that the word "*creditors*" referred only to creditors who had some interest in the land; and therefore, that a judgment, though not duly re-registered, was not void as against creditors generally (*l*). Stat. 2 & 3
Vict. c. 11,
s. 4.

On and after the 1st July, 1901, a judgment or recognizance, whether obtained or entered into before or after that date, will Land
Charges Act,
1900.

(*k*) *Evans v. Williams*, 2 Dr. & Sm. 325. But a judgment signed before the passing of the Act, and not registered till after the death of the testator, which happened after the passing of the Act, was held to be deprived, by sect. 3, of priority in the administration of his assets: *Kemp v. Waddingham*, L. R. 1 Q. B. 355.

(*l*) *Simpson v. Morley*, 2 Kay & J. 71.

not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any land, unless or until a writ or order for the purpose of enforcing it is registered under sect. 5 of the Land Charges Registration and Searches Act, 1888 (*m*).

Judgments have no precedence among themselves.

Between one judgment and another obtained against the deceased, as they stand among themselves, precedence or priority of time is not material, as far as regards the personal estate (*n*). Nor is there preference to be claimed by the creditor with respect to the original cause of action; for a judgment against the testator on a debt by simple contract, is of the same nature as a judgment on a specialty (*o*).

Of several judgment creditors, therefore, he who first sues out execution must be preferred; and before any execution sued, it is at the election of the executor or administrator to pay whom he will first (*p*).

2. Decree in Equity:

equal to a judgment at law:

the executor could not plead it at law, but must have had an injunction:

what sort of decree entitled to this precedence,

2. A decree in a Court of Equity, obtained against the testator or intestate, was, in respect of the course of administering assets, equivalent to a judgment at law against him, and stood in the same order of payment.

However, an executor or administrator, if sued at law for a debt of inferior degree, could not plead or give in evidence a decree of a Court of Equity (*q*). But he might relieve himself by a bill in equity, and have an injunction (*r*).

A decree not conclusive of the matters in question, as if it be merely to account, and which does not ascertain the sum to be paid, is no complete judgment until the account be stated. Therefore, it was held, that, pending a bill in equity, and after such decree against his testator, an executor might pay any other debt of a higher or equal nature, in case the assets be legal, although he had no power to do so, as against a final decree (*s*).

A common order in a foreclosure action gives no priority; for it is not an order for payment of money, but only in bar of the equity of redemption (*t*).

(*m*) 63 & 64 Vict. c. 26, s. 2; *Ashburton v. Nocton*, [1915] 1 Ch. 274.

(*n*) Wentw. Off. Ex. 269, 14th edit.; *M'Causland v. O'Callaghan*, [1904] 1 Ir. R. 376.

(*o*) Toller, 264.

(*p*) Wentw. Off. Ex. 269, 14th edit.

(*q*) *Stasby v. Powell*, 1 Freem. 334.

(*r*) *Ibid.*; *Harding v. Edge*, 1 Vern. 143.

(*s*) *Smith v. Eyles*, 2 Atk. 385; but see *post*, pp. 794, 795.

(*t*) *Wilson v. Lady Dunsany*, 18 Beav. 293, 299.

3. Recognizances and statutes. Next in rank to judgments and decrees are recognizances and statutes.

3. Recognizances and statutes:
recognizance :

A recognizance is an obligation of record; it may be entered into by the party before a Court of Record, or a magistrate duly authorized, conditioned for the performance of a particular act; as to appear at the assizes, to keep the peace, to pay a debt or the like (*u*). A recognizance is, in most respects, like another bond. The chief distinction between them is, that the latter is the creation of a new debt, or an obligation *de novo*, the former is an acknowledgment on record of a prior debt, of which the form is: "That A. B. doth acknowledge to owe our lord the king (to the plaintiff, to C. D., or the like), the sum of ten pounds," with condition to be void on performance of the thing stipulated. And in such case, the king (the plaintiff, or C. D.) is called the cognizor, "*is cui cognoscitur*," as he that enters into the cognizance is called the cognizee, "*is qui cognoscit*." This instrument being either certified to, or taken by the officer of some Court, is authenticated only by the record of such Court and not by the party's seal (*x*).

A recognizance is not a record until it is enrolled (*y*), and although the creditor claiming under a recognizance not enrolled will still be considered as a bond creditor, the sealing and acknowledging thereof supplying the want of delivery (*z*), yet this will give it no preference since 32 & 33 Vict. c. 46 (Hinde Palmer's Act, 1869 (*a*)).

If a recognizance be enrolled by special order of Court after the time for the enrolling of it has elapsed, that makes the recognizance effectual from the time of the date (*b*). But whenever the Court permits the enrolling of a recognizance, after the time elapsed, it always takes care not to hurt an intervening purchaser (*c*).

Of securities by statute, there were three species; statutes merchant, statutes staple and recognizance in the nature of statutes staple; and though they are fallen into disuse and the statutes on which they depended repealed, yet, as they are fre-

securities by statute :

(*u*) 2 Black. Comm. 341.

(*x*) *Ibid.*

(*y*) *Glynn v. Thorpe*, 1 Barn. & Ald. 158.

(*z*) *Bothomly v. Fairfax*, 1 P. Wms. 334, 340.

(*a*) See *post*, p. 782.

(*b*) *Fothergill v. Kendrick*, 2 Vern. 234.

(*c*) 1 P. Wms. 340; 2 Vern. 234.

quently alluded to in argument, especially on this subject, it seems necessary to give some explanation of them.

statute merchant:

A statute merchant is a bond of record acknowledged before the Mayor of London, or chief warden of some other city or town, or other discreet men, chosen and sworn for that purpose, when the mayor or chief warden cannot attend, or before one of the clerks of the statute merchant nominated by the king, pursuant to the statute of Acton Burnell, 11 Edw. I. (enforced and amended by stat. 13 Edw. I. st. 3, *de mercatoribus*). This recognizance is to be entered by the clerk on a roll, which must be doubled, one part to remain with the mayor or chief warden, and the other with the clerk, who shall write with his own hand an obligation, to which the debtor's seal, together with the seal of the king appointed for that purpose shall be affixed (*d*). The design of this security was to encourage trade, by providing a sure and speedy remedy for merchants, strangers as well as natives, to recover their debts at the day assigned for payment. Afterward, other persons, observing that it was much of the same nature with a judgment, but obtained with infinitely less trouble and expense, frequently entered into this species of contract, until, by degrees, it became a common assurance. The addition of the king's seal was to authenticate the security, and to make it of so high a nature, that, on failure of payment by the debtor at the day assigned, execution might be awarded without any mesne process to summon him, or the trouble or charge of bringing in proof of the debt.

statute staple:

A statute staple is a bond of record, acknowledged before the mayor of the staple (*e*) in the presence of the constables of the staple, or one of them, pursuant to stat. 27 Edw. III. st. 2, c. 9. To this end the statute requires, that there shall be a seal ordained, which shall be affixed to all obligations made on such recognizances acknowledged in the staple, and the seal shall remain in the custody of the mayor of the staple, under the seals of the constables (*f*). This security was also only designed for the merchants of the staple, and for debts on the sale of mer-

(*d*) Bac. Abr. Execution, 331.

(*e*) The statute of the staple, 27 Edw. III. stat. 2, confined the sale of all English commodities, that were to be exported, to certain towns in England, called the estaple or staple, where foreigners might resort to purchase: Cruise, Tit. XIV. s. 10.

(*f*) Bac. Abr. Execution, 331, 332.

chandises brought there; but, in time, others began to apply it to their own ends: and the mayor and constables would take recognizances from strangers, surmising it was made for the payment of money for merchandises brought to the staple. To prevent this mischief, the Parliament, by stat. 23 Hen. VIII. c. 6, s. 11, reduced the statute staple to its former channel, and laid a penalty of 40*l.* on the mayor and constables who should extend the benefits of the statute to any but those of the staple.

But though that statute deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of a recognizance, on 23 Hen. VIII. c. 6, or a recognizance in the nature of a statute staple, so called, because this Act limits and appoints the same process, execution, and advantage in every particular, as is provided for the statute staple (*g*). A recognizance, therefore, in nature of a statute staple, as the words of the Act declare, is the same with the statute staple, only acknowledged before other persons; for, as the statute runs, the chief justices of the King's Bench and Common Pleas, or in their absence out of term, the mayor of the staple at Westminster and the recorder of London jointly together, shall have power to take recognizances for payment of debts in the form set down by the statute (which see in sect. 2 of the statute 23 Hen. VIII. c. 6). In this, as in the former cases, the king appoints a seal to attest the contract, and each of the justices has the keeping of one such seal, and the mayor of the staple at Westminster and recorder another, of the like print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor and recorder, must be sealed with the seal of the conusor, the king's seal, and the seal of the chief justice, or the seals of the mayor and recorder, before whom it is taken, who are likewise obliged to subscribe their names.

Recognizance
in nature of
statute
staple:

A statute, which was void for the want of the formalities required by the Act of Parliament, was considered a bond, and had the same rank among debts as to payment (*h*).

Although recognizances were entered on the rolls of the King's Courts, while statutes were consigned to the custody of

(*g*) *Ibid.* 332.

(*h*) *Hollingsworth v. Ascue*, Cro. Eliz. 355, 461, 494, 544; *S. C.*, Moor. 405; 2 Roll. Abr. 140, Obligation (I.).

the party, and hence were called pocket records (*i*), yet both species of securities, having been entered into voluntarily and privately, were regarded as equal in their nature, and payable in the same order (*k*). Nor was it material, in regard to payment by the executor, which of them were prior or subsequent in point of date: Therefore, where there were many cognisees, he might prefer a subsequent to a prior statute or recognizance; for they all equally affected the personal estate, although, as to lands, the first in point of time had the preference (*l*).

If a statute was joint and several, the cognizee might elect to sue either the surviving obligor, or the executor of him who was dead, or both, in separate actions: If it was joint only, the survivor alone was liable (*m*).

With respect to recognizances and statutes for the payment of money on a future day, or on a contingency, they will be considered more conveniently hereafter together with debts by specialty of the same nature (*n*).

SECTION III.

Debts by Specialty, and by Simple Contract.

Formerly next in precedence in the order of payment were debts by special contract; as on bonds, covenants, and other instruments under the seal of the party: all these must have been paid by an executor or administrator before debts by simple contract (*o*).

But now by stat. 32 & 33 Viet. c. 46 (Hinde Palmer's Act, 1869), after reciting "that it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons," it is enacted by sect. 1, that "in the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made

(*i*) *Harrison's Case*, 5 Co. 28, *b*.

(*k*) Wentw. Off. Ex. 273, 14th edit.; Toller, 275.

(*l*) Wentw. Off. Ex. 273, 14th edit.; 3 Bac. Abr. 81, tit. Exors. (L. 2); Com. Dig. Admon. (C. 2).

(*m*) *Rogers v. Danvers*, 1 Mod. 165; *S. C.*, 1 Freem. 127.

(*n*) *Post*, p. 784.

(*o*) *Pinchon's Case*, 9 Co. 88, *b*.

Stat. 32 & 33
Vict. c. 46.
All specialty
and simple
contract debts
of deceased
persons to
stand in equal
degree after
1st of
January,
1870.

or constituted a specialty debt: but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law, to the contrary notwithstanding: Provided always that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

It has been held that this statute has the effect of enabling an executor to pay simple contract debts in preference to specialty debts in the administration of an insolvent estate (*p*).

A debt for rent which also ranked in the same degree as a Rent. debt by obligation, or other instrument under seal, has now no preference (*q*).

A bond or covenant merely voluntary shall be postponed to simple contract debts, which are *bonâ fide* owing for valuable consideration; but such bond or covenant, if not to the prejudice of creditors, must be paid by the executor, and in preference to legacies (*r*). For a bond or covenant, however voluntary, transfers a right in the lifetime of the obligor; whereas legacies arise from the Will, which takes effect only from the testator's death, and therefore they ought to be postponed to a right created in his lifetime (*s*).^N

Voluntary
bonds or
covenants.

Accordingly, it has been held, that the payment of the expenses of the reconveyance of mortgaged premises to the real representative, and the costs of an ejectment to recover the mortgaged premises, ought to be postponed by an executor to the payment of an annuity creditor by voluntary deed: And further, that an executor cannot, as against such voluntary creditor, be allowed a payment made out of the assets on account of a mortgage debt, created by an ancestor of the testator, to whom the mortgaged estate had descended (*t*).

(*p*) *Re Samson*, [1906] 2 Ch. 584, overruling *Re Hankey*, [1899] 1 Ch. 541.

(*q*) *Re Hastings*, 6 C. D. 610. A landlord has therefore no preferential claim against the estate of a deceased tenant for rent in arrear at the death of the tenant as against the simple contract creditors: *Ibid*.

(*r*) *Jones v. Powell*, 1 Eq. Cas. Abr. 84, pl. 2; *Cox v. Barnard*, 8 Hare, 310; *Hales v. Cox*, 32 Beav. 118; *Dawson v. Kearston*, 3 Sm. & G. 314. Creditors by specialty, who are mere volunteers as against the devisees of the debtor, have a right to stand in the place of mortgagees: *Lomas v. Wright*, 2 M. & K. 769.

(*s*) Toller, 283.

(*t*) *Edwards v. Edwards*, 2 Cr. & Mees. 612.

Now by virtue of sect. 10 of the Judicature Act, 1875, the rule in bankruptcy that voluntary creditors are to be paid *pari passu* with creditors for value has been introduced into the administration by the Court of the estates of deceased insolvents (*u*).

In the case of *Tanner v. Byne* (*x*), a husband made a post-nuptial settlement of 4,000*l.* in favour of his wife and children; and then, in consideration of the 4,000*l.* expressed to have been lent to him by the trustees of the settlement, he made a mortgage to them of a real estate to secure that sum, and covenanted to repay it: The husband never, in fact, paid the 4,000*l.* to the trustees; nevertheless, it was holden by Sir John Leach, V.-C., that they were specialty creditors of the husband. Further, it has been held that a voluntary bond, *assigned for value*, ought, in the administration of assets, to stand upon the same footing as a bond originally given for value: And accordingly it was decided that the assignee for value of an equitable interest in the money payable under a voluntary bond, was not postponed to simple contract debts (*y*).

Bonds
usurious or
ex turpi
causâ.

An executor has no authority to pay a bond founded on an usurious contract (given when by law usury was prohibited) or a bond *ex turpi causâ*: such payment will amount to a *devastavit*, as well against legatees as against creditors (*z*).

Future debts.

With regard to priorities of the different classes of debts a distinction has always been drawn between contingent securities and those for future debts. Thus it was held that if a statute or recognizance were for the payment of a sum of money at a day certain, although the day were not arrived, yet it was a debt of the same class with other statutes: for it was a present and immediate duty to be discharged at a future period (*a*).

But where there were two debts upon specialities, and of one the day of payment was past, and of the other the day of pay-

(*u*) *Re Whitaker*, [1900] 2 Ch. 676; [1901] 1 Ch. 9; and see *ante*, p. 771.

(*x*) 1 Sim. 160.

(*y*) *Payne v. Mortimer*, 4 De G. & J. 447.

(*z*) *Winchcombe v. Bishop of Winchester*, Hob. 167, cited 1 Brownl. 33; *Robinson v. Gee*, 1 Ves. Sen. 254. As to re-opening transactions of money-lenders, see the Money-lenders Act, 1900 (63 & 64 Vict. c. 51).

(*a*) *Robson v. Francis*, 1 Roll. Abr. 925; Exors. (Q.) 2; 1 Roll. Rep. 405, pl. 33; *S. C.*, cited by Vaughan, C. J., Vaugh. 103; *Goldsmith v. Sidnor*, 1 Roll. Abr. 925, 923, pl. 4; *S. C.*, Cro. Car. 352.

ment was not come, it was held that the executor might not pay the latter debt before the former (b).

With respect to contingent debts, the executor cannot generally pay anything until the contingency has occurred, and could not formerly refuse to pay a simple contract debt on the ground that he might have to provide for contingent specialty debts. This latter proposition appears from the cases cited below as they stood in former Editions of this Work. But with regard to the former proposition it is to be observed that inasmuch as, if the estate of the deceased is insolvent, it is provided by sect. 10 of the Judicature Act, 1875, that in an administration by the Court the same rule shall prevail and be observed as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities, respectively, as may be in force for the time being under the law of bankruptcy with respect to the estate of persons adjudged bankrupt, it would seem that in the case of insolvent estates a contingent creditor may have his debt valued and prove immediately. And it has been held that, by virtue of the above section and sect. 37 of the Bankruptcy Act, 1883, a company may prove in the administration of the insolvent estate of a deceased shareholder for the estimated value of the liability to future calls in respect of the shares standing in his name (c). But where the estate is solvent it is not the practice of the Court to retain funds in Court to meet contingent future liabilities, the executors being sufficiently protected by the order of the Court made in the administration of the estate (d).

Contingent
debts.

With respect to contingent securities, it was held that they should not stand in the way of debts of inferior degree: Therefore, if the condition of a recognizance were for the payment of 100*l.* to an infant when he came to his full age, the recognizance during the infancy was no bar to debt upon bond, because it was uncertain whether anything should ever be paid upon the recognizance; for the infant might die before his full age, and then nothing should be paid (e). So the payment of a simple

(b) 1 Roll. Abr. 927, tit. Exors. (R.) pl. 5 (citing Doctor and Stud. 77, b; 9 E. 4, 13); Wentw. Off. Ex. Ch. 12, pp. 277, 278, 14th edit.

(c) *Re McMahon*, [1900] 1 Ch. 173.

(d) *Re King*, [1907] 1 Ch. 72.

(e) *Robinson v. Francis*, Bridgm. 79; *S. C.*, 1 Roll. Abr. 925, tit. Exors. (Q.) pl. 3; 1 Roll. Rep. 405, pl. 35; *Harrison's Case*, 5 Co. 23, b.

contract debt before a bond conditioned for indemnity used, when specialty debts had a preference, to be held good, if no breach of the condition had taken place (f). And if subsequently to the payment of the simple contract debt, the contingency happened, and the bonds were put in suit, it was a good defence for the executor that he had paid the simple contract debt, and had no more assets wherewith to satisfy the bond (g).

In the case of *Read v. Blunt* (h), the testator had entered into a covenant with the plaintiff, for securing to him an annuity for his life, and had executed a warrant of attorney, as a further security, but judgment had not been entered up under it: The bill prayed for an account of the testator's assets, and that the defendants, his executors, might be ordered to set apart a sufficient part of the assets, to answer the future payments of the annuity: and that in the meantime they might be restrained from parting with any of the assets, either to the creditors or legatees of the testator: Some of the testator's simple contract debts remained unpaid, but the annuity was not in arrear, and the executors had a balance in hand: And it was contended that the relief asked was frequently granted in the case of legatees (i): But Sir L. Shadwell, V.-C., refused the motion for an injunction, and said, that "if there was anything like misapplication of assets in this case, that would be a reason for the Court interfering: The executors may, by law, the day before an instalment of the annuity becomes due, apply the whole of the assets to pay the simple contract debts: The case of a bond creditor is different; for, when the condition of a bond is broken, the whole penalty is due: Here no case has been made out of probable misapplication of assets; and certainly none has been made out of the

(f) *Eeles v. Lambert*, Aleyn, 40; *S. C.*, cited in 2 Vern. 101.

(g) See *Collins v. Crouch*, 13 Q. B. 542, accord. See also *Philips v. Echard*, Cro. Jac. 8, where all the Court agreed, that if an executor pay debts upon an obligation, before a statute is broken, and afterwards a covenant is broken, whereby suit is upon that statute, payment of the debt upon the obligation, and that he hath no more in his hands of the testator's goods, is a good bar against the statute. However, in *Woodcock v. Hern*, Goldsb. 142, pl. 57, the reporter assumes, that if the executor pays the debt and the statute is broken, he would be chargeable by a *devastavit* of his own proper goods.

(h) 5 Sim. 567.

(i) *Slanning v. Style*, 3 P. Wms. 336. The question, whether an annuitant under a *Will*, has a right to have an adequate portion of the assets set aside for the satisfaction of his legacy, turns on an entirely different principle, connected with the appropriation of legacies payable *in futuro*. As to which, see *post*, Pt. III. Bk. III. Ch. IV. § IV.

past misapplication." As the law stood, at the time of this decision, the annuity could not have been apportioned; and, therefore, the debt was *contingent* on the event of the annuitant living till the day of payment; and the case fell within the rule (above stated) as to the priority of simple contract debts payable *in præsentì* to contingent debts by specialty. But since the stat. 4 Wm. IV. c. 22, s. 2, and 33 & 34 Vict. c. 35 (j), the claim of the personal representatives of the annuitant for an apportionment may perhaps stand on a different footing, and they may be entitled so far as regards the part apportionable to the past to have it treated as a debt *in præsentì*.

In *Re Hargreaves* (k) it was held by the Court of Appeal that so long as an annuity, payable under a covenant by the testator, is paid, and there are no arrears, the annuitant has no right to bring an action at law against the executors, and, therefore, no right to an order for the administration of the estate; though if an administration decree has been obtained by some one else as creditor, he is allowed to prove for the value of the future annuity in competition with the other creditors.

However, where the contingency has taken place by a breach of the condition, the securities will stand in the same rank as other debts, and the conusees, obligees, or covenantees may enforce their claims under them, as debts due *in præsentì*, whether the debt is ascertained, or the damages are unliquidated: Thus in *Cox v. Joseph* (l), the testator had executed a bond in 2,800*l.* conditioned to indemnify the obligee against another bond for 800*l.* which he had executed jointly with the testator as surety for the debt of the testator, in whose lifetime the 800*l.* had become due, and were still unpaid: And it was held a good plea in bar by the executrix, to a simple contract creditor, that the bond for 2,800*l.* was unpaid, and that she had not assets more than sufficient to satisfy the penalty of it. So in *Musson v. May* (m), the intestate and another were jointly indebted as partners, and the intestate, for a valuable consideration, on dissolving partnership, covenanted that he alone would pay the joint debts, and indemnify his partner against them: The intestate died, leaving partnership debts undischarged: And Sir Wm. Grant held, that the covenantee was to be con-

(j) See *ante*, p. 633.

(k) 44 C. D. 236. See also *Re Beeman*, [1896] 1 Ch. 48.

(l) 5 T. R. 397.

(m) 3 V. & B. 194.

sidered as a specialty creditor under the covenant, at the time of the death of the intestate.

In an early decision (*n*), the testator acknowledged a recognizance in the nature of a statute staple, whereof the defeasance was, that, whereas the conusee and testator were bound in a bond to B., a stranger, for the debt of the testator, and as his surety, with condition for payment of 100*l.* at a day yet to come, it was granted by the said defeasance, that if the testator, his executors, or assigns, paid the 100*l.* to B. at the day, then the statute should be void: And it was holden, that, though in this case the day of payment was not yet come, and though it was a collateral sum to be paid to a stranger to the statute, and not to the conusee, and so no duty to the conusee, and peradventure the heir of the testator would pay the money at the day, yet, inasmuch as it was for payment of the money certain, for which, by intendment, the executor would be charged, the executor might plead this statute, in bar of an action of debt upon a bond, before the day of payment came.

Debts by simple contract.

Last in order of payment came debts on simple contract; as on bills or notes not under seal. and verbal promises, or such as are implied in law.

Of debts of this nature, those due to the King shall, it seems, be satisfied before debts due to subjects (*o*).

Damages for injuries done by deceased to the real or personal property of another.

The damages recovered in an action against an executor or administrator, under the stat. 3 & 4 Wm. IV. c. 42, s. 2, in respect of any injury by the deceased to the real or the personal property of another (*p*), are by that statute directed to be payable in like order of administration as the simple contract debts of the deceased.

Dilapidations.

Formerly damages for dilapidations, payable by the executors or administrators of the late incumbent of a benefice to his successor, were postponed, in order of payment, to the debts of the deceased of every description (*q*).

But now the amount and mode of payment of damages for dilapidations payable by the executors or administrators of the late incumbent of a benefice to his successor are governed by

(*n*) *Goldsmith v. Sidnor*, 1 Roll. Abr. 925, tit. Exors. (Q.) pl. 4.

(*o*) 3 Bac. Abr. 80, tit. Exors. (L.) 2.

(*p*) See *post*, Pt. IV. Bk. II. Ch. I. § 1.

(*q*) *Degge's Parson's Counsellor*, p. 91: *Bryan v. Clay*, 1 E. & B. 38.

the provisions of the Ecclesiastical Dilapidations Act, 1871 (*r*) (34 & 35 Vict. c. 43). The Bishop, within three months of the avoidance of the benefice, directs the diocesan surveyor to inspect and report to him what sum is required to make good the dilapidations to which the estate of the late incumbent is liable, the executors or administrators of such late incumbent having a right of entry with their surveyor upon the premises of the vacated benefice until the final settlement of the question of dilapidations. The surveyor sends a copy of his report (when made) to the new incumbent, and also to the executors and administrators of the late incumbent, and to this report it is competent to such executors and administrators, as well as to the new incumbent, within one month's time (*s*), to state in writing their objections and transmit them to the Bishop. The Bishop shall in *uncontested* cases, as soon as conveniently may, be after the time for the transmission of objections has expired, and in *contested* cases after consideration of the whole matter, make an order stating the repairs and their cost for which the executors or administrators of the late incumbent are liable, and shall send a copy of such order to the new incumbent, another copy to such executors or administrators, and a third copy to the registrar of the diocese (*t*).

The sum stated in the order as the cost of the repairs is a debt due from the executors or administrators of the late incumbent, and is recoverable as such at law or in equity (*u*);

The sum so stated in the order made by the Bishop as the cost of the repairs is a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors (*x*).

A very important question arises with respect to contingent debts; viz., whether an executor or administrator can pay legacies, or deliver over a residue, where there is an outstanding covenant, or like obligation of the testator, which may or may not be broken hereafter: And a further question occurs, connected in some degree with the present inquiry, viz., whether, under any circumstances, an executor can be allowed payments

Payment of legacies before contingent debts, or debts of which an executor has no notice.

(*r*) Sects. 29—36.

(*s*) The Bishop may, however, if he thinks fit, for special reasons, receive objections at a later period: sect. 33.

(*t*) Sects. 34, 35.

(*u*) Sect. 36.

(*x*) *Re Monk*, 35 C. D. 583.

made to legatees, as against creditors of whose claims he had no notice. But it will be more convenient to consider these points hereafter, together with the subject of the Payment of Legacies generally (y).

Priority of
debts with
respect to an
executor *de
son tort*.

It may be proper, in conclusion, to consider the subject of the priority of the debts of the deceased with reference to the character of an executor *de son tort*. It has appeared in a former part of this Work, that if a creditor brings an action against such an executor, the defendant may give in evidence, under a plea of *plene administravit*, payments by himself of just debts of the deceased which have exhausted all the assets which have come to his hands (z), although it will afford him no defence, that *after action brought* and before plea pleaded, he delivered over such assets to the rightful executor or administrator (a). Nevertheless, he is justified, even after action brought, in applying the assets which are in his hands to the payment of a debt of a superior degree. Thus in the case of *Oxenham v. Clapp* (b), the plaintiff declared in *assumpsit* against the defendant as executrix for work and labour done by him as the attorney of the deceased: The defendant pleaded, that *since the exhibiting of the bill* she had exhausted the assets which had come to her hands in the payment of a bond debt of her testator: The plaintiff replied, that the defendant was executrix of her own wrong, that she had never been called on to pay, nor had paid the money due upon the bond, and that at the time of exhibiting the bill she had sufficient assets to satisfy the plaintiff: The defendant's rejoinder merely repeated the allegation in the plea, that she had paid the money due on the bond: Whereupon the plaintiff demurred; and, after argument, the Court of K. B. gave judgment upon the demurrer for the defendant.

However, Lord Tenterden observed in this case that he was not prepared to say, that if it had been alleged that the payment had been voluntary, the defendant could have justified paying a debt of equal degree with that of the plaintiff: because that might have been taking an undue advantage of her own wrong.

(y) *Post*, Pt. III. Bk. III. Ch. IV. § 1.

(z) *Ante*, p. 187.

(a) *Ante*, p. 188.

(b) 2 B. & Adol. 309.

It may be inferred from that which has been shown in this section with respect to a rightful executor, that when it is laid down that an executor *de son tort* may defend himself in an action by a creditor, by showing that he has applied all the assets come to his hands in the payment of debts, it must be intended that such debts were of equal or superior degree to those upon which the action is brought (c).

SECTION IV.

The payment of an inferior Debt by an Executor or Administrator before a superior, without notice: and suffering Judgment, on an inferior Debt, without notice of a superior.

Having thus considered the priority in degree of the different sorts of debts due from the deceased, it remains to point out more particularly how this precedence operates in the course of administration of assets by the executor or administrator. It should, however, be observed, that the principles discussed in this section are now of much less frequent application than formerly, by reason of specialty debts having lost their priority by 32 & 33 Vict. c. 46.

It has already been stated generally, that if an executor or administrator pays a debt of a lower degree before one of a higher, he must, on a deficiency of assets, answer that of a higher out of his own estate (d). But it must be understood, that at the time of such payment, *he had notice* of the existence of the superior debt: For an executor may voluntarily pay a debt of inferior nature before one of a superior, of which he had no notice (e): otherwise it would be in the power of a superior creditor to ruin an executor, by suppressing his security till all the assets were exhausted in the payment of debts of an inferior degree (f).

Again, it is a general rule, that an executor or administrator is bound to plead a debt of a higher nature in bar of an action

An executor may voluntarily pay an inferior debt before a superior without notice.

An executor who has suffered judgment.

(c) 2 Black. Comm. 507, 508.

(d) *Ante*, p. 764.

(e) *Harman v. Harman*, 2 Show. 492: Provided a reasonable time has elapsed since the testator's death; for such payment, if precipitate, would be evidence of fraud: Toller, 192. See also *Re Fludyer*, [1898] 2 Ch. 562.

(f) 3 Bac. Abr. 82, tit. Exors. (L.) 2.

ment on an inferior debt, without notice of a superior, may plead the judgment in bar to the superior creditor.

brought against him for a debt of an inferior nature, and *riens ultra*, if he has not assets for both: otherwise it will be an admission of assets to satisfy both debts (*g*). But it is obvious, that this must also be understood with the qualification that the executor or administrator *had notice* of the superior debt. Accordingly, it was established that an executor or administrator might, to an action by a specialty creditor, plead a judgment recovered against him on a simple contract, without notice of the specialty debt, and *riens ultra* (*h*): For, by reason of his having had no notice, it was not in the power of the executor or administrator to prevent the recovery of such judgment, by pleading the outstanding superior debt. But in the plea of judgment recovered to the action by the superior creditor, it must be expressly averred that the executor or administrator had no notice of the superior debt (*i*).

What shall be sufficient notice to bind the executor.

With respect to what shall be sufficient notice, there is a distinction between debts of record and other debts. For of debts of record, an executor or administrator is bound to take notice at his peril; on the principle that every one is presumed to have cognizance of the proceedings in the King's Courts. Thus, in *Littleton v. Hibbins* (*j*), a *scire facias* was brought against executors, upon a judgment against their testator in debt: They pleaded, that before they had any conuzance of this judgment, they had fully administered all their testator's goods in paying debts upon obligations: And it was thereupon demurred; and after argument, adjudged for the plaintiff, that the plea was bad; for the executors at their peril ought to take conuzance of debts upon record.

(*g*) *Rock v. Leighton*, 1 Salk. 310; 1 Saund. 333, *a*, note. The law gives no opportunity of setting up any debts of a superior nature to that of an inferior, except before a plea pleaded: *Abbis v. Winter*, 3 Swanst. 578, note.

(*h*) *Davies v. Monkhouse*, Fitzgib. 76. The executor, if he has not assets to satisfy both judgments, *must* plead as above; for it is held, that if, in ignorance of the existence of a bond, an executor confess a judgment on the simple contract, and afterwards judgment be given against him on the bond, he is bound, however insufficient the assets, to satisfy both judgments; since he might have pleaded the first, if he had not assets for both: *Britton v. Batthurst*, 3 Lev. 114. See also *Re Fludyer*, [1898] 2 Ch. 562, in which the rule that an executor who pays creditors without notice of the existence of a creditor of a higher degree is not liable to account for the sums so paid at the instance of that creditor was held to apply to the retainer by an executor of a debt due to himself.

(*i*) *Sawyer v. Mercer*, 1 Term Rep. 690.

(*j*) Cro. Eliz. 793.

The difficulty and hardship upon personal representatives, of finding such judgments, was the occasion of the passing of the statute of 4 & 5 Wm. & M. c. 20, which there has lately been occasion to mention (*k*), respecting the docketing of judgments entered in the Courts at Westminster. Of debts by judgments docketed in pursuance of that statute, and of the subsequent statutes (*l*), and of debts by judgments in inferior Courts of Record, of debts due by recognizance or statute, and other debts of record, such constructive notice to an executor or administrator is sufficient, and he must at his peril give them precedence in payment to debts of inferior degree (*m*).

It must here be observed, that where a judgment has not been docketed pursuant to the statutes, the circumstance that *actual notice* of it has been received by the executor or administrator will not entitle it to any priority or preference in administration; because the effect of the statutes is, that a judgment not docketed in pursuance of them is to be considered only as a simple contract debt (*n*).

But with respect to other species of debts, there must be actual notice; and it has been asserted that such notice must be by suit (*o*). But it seems clear, that an executor, if he be by any means apprised of a debt of a higher nature, would not be justified in exhausting the assets in the discharge of one which is inferior (*p*).

SECTION V.

The Power of Preference by an Executor or Administrator among Creditors of equal degree.

The situation of an executor or administrator is frequently one of great difficulty. The law imposes on him the burthen of paying the debts of the testator or intestate in a particular order. On the other hand, it confers on him certain privileges. One of those privileges is, that among creditors of equal degree,

(*k*) *Ante*, p. 776.

(*l*) See *ante*, p. 777.

(*m*) Toller, 278, 292.

(*n*) See *ante*, p. 776; *Hall v. Tapper*, 3 B. & A. 655; *Van Gheluive v. Nerinckx*, 21 C. D. 189.

(*o*) *Brooking v. Jennings*, 1 Mod. 175.

(*p*) Toller, 292; *Oxenham v. Clapp*, 2 B. & Adol. 312, *per* Parke and Patteson, JJ.

he may pay one in preference to another (*q*). And having regard to 32 & 33 Vict. c. 46, by which "all creditors, as well specialty as simple contract, shall be treated as standing in equal degree," it has been held by the Court of Appeal that an executor is entitled to prefer a simple contract to a specialty creditor in the case of an insolvent estate (*r*).

To entitle an executor to insist on his right to prefer a creditor and to be allowed the amount paid by him out of the assets of the testator's estate, it is not necessary for him, in the event of the estate proving insolvent, to establish that at the time he made the payment he had assets of the testator in hand. He may if he pleases himself advance the money to the estate for the purpose of such payment, and if he does so he will be entitled to recoup himself out of subsequent assets of the estate which may come into his hands (*s*).

But an executor's election may, in some measure, be controlled by legal or equitable proceedings against him, of which it will be proper to take notice in this place.

Of controlling
the executor's
preference by
proceedings
at law or in
equity.

If one of several creditors of equal degree, suing for himself, sues the executor or administrator and obtains judgment against him, whether in the King's Bench or Chancery Division of the High Court, such creditor must be satisfied before the rest, and thus the preference of the executor or administrator is altogether precluded. And although by virtue of sect. 10 of the Judicature Act, 1875, such a creditor must, it appears, be treated as standing in an equal degree with other creditors in the administration by the Court of an insolvent estate (*t*), yet otherwise the effect of such a judgment is still the same as regards the executor's right of preference.

(*q*) By Abbott, C. J., in *Lyttleton v. Cross*, 3 B. & C. 322. Where an executor, having assets of his testator, either in money or goods, before any bill filed for the administration of the estate, applied to a creditor of the testator for a loan of a sum equal to the amount of his debt, and the creditor accepted the personal security of the executor for the amount, and released the debt against the estate, it was held by Wigram, V.-C., that the executor having, by such substitution of his own security for that of the estate, discharged the debt as against the estate, should not be treated as a mere purchaser of the debt, but was entitled to be allowed the amount of it as a debt of the testator preferred and paid: *Hepworth v. Heslop*, 6 Hare, 561.

(*r*) *Re Samson, Robbins v. Alexander*, [1906] 2 Ch. 584.

(*s*) *Re Jones, Peak v. Jones*, [1914] 1 Ch. 742.

(*t*) *Re Whitaker*, [1901] 1 Ch. 9, in effect overruling *Re Maggi*, 20 C. D. 545, and *Re Williams*, 15 Eq. 270, and the dictum of Jessel, M. R., in *Re Stubbs*, 8 C. D. at 155. See *ante*, p. 771.

Before the Judicature Act, the established rule was that if an executor or administrator had notice of the commencement of an action at law by a creditor, he was restrained from making a voluntary payment to any other creditor of equal degree (*u*), but if he had notice of the commencement of a suit in equity and before decree he paid any particular creditor in preference, he was allowed such payment in passing his accounts (*v*).

Whether an executor after commencement of an action by a creditor can voluntarily pay another creditor of equal degree.

Since the Judicature Act the rule in equity and not at law prevails (*w*), and the voluntary payment of a creditor by an executor or administrator with notice of the commencement of an action by another creditor whether in the King's Bench or Chancery Division of the High Court and *before judgment* is a good payment, and will be allowed to him in passing his accounts (*x*). But a receiver will not be appointed merely to prevent such payments being made (*y*). Nothing short of an order for administration will prevent it (*z*).

Where a creditor of the deceased sues the executor or administrator in the Chancery Division not for his own debt alone, but *for himself and all other creditors*, and a judgment is obtained for an account and a distribution; this is considered as in the nature of a judgment for all the creditors (*a*): and after such

An executor cannot pay in preference, after a decree to account in a suit by one creditor for himself and all others.

(*u*) *Parker v. Dee*, 3 Swanst. 531.

(*v*) *Darston v. Lord Orford*, Colles, 229.

(*w*) Judic. Act, 1873, s. 25, sub-s. 11.

(*x*) *Re Radcliffe*, 7 C. D. 733; approved by the Court of Appeal in *Vibart v. Coles*, 24 Q. B. D. 364.

(*y*) *Philips v. Jones*, 28 Sol. Jo. 360; *Re Wells*, 45 C. D. 569.

(*z*) *Re Barrett*, 43 C. D. 70.

(*a*) *Goate v. Fryer*, 3 Bro. C. C. 22; *S. C.*, 2 Cox, 202; *Paxton v. Douglas*, 8 Ves. 520; *Perry v. Phelps*, 10 Ves. 40; even though the plaintiff may fail to establish any debt: *Re Ross*, [1907] 1 Ch. 482, 485. Accordingly, where a creditor obtained a judgment against the executor, and on the same day a decree was made for the administration of assets, it was held that the judgment and decree ought to be deemed to have been obtained at the same moment, and the judgment creditor had obtained no priority: *Parker v. Ringham*, 33 Beav. 535. The rule is stated to be that the Court will inquire, if necessary, at what part or fraction of a day an act of the party is done, but will not inquire at what part or fraction of the day a judicial act is done. But in *Clarke v. Bradlaugh*, 8 Q. B. D. at p. 65, Lord Coleridge, C. J., said: "It might perhaps be also found, though it is not for us on the present occasion to decide, that even of two judicial acts done on the same day, the Court would inquire, if it were necessary, which was done at the earlier time of the day." And Brett, L. J., at p. 68, said: "As for the rule that judicial acts relate back to the earliest moment of the day, I know of no principle on which it can be founded. It is an artificial rule, declared for a long number of years to be a part of the common law procedure, and therefore it is to be assumed to be as old as the common law itself. But it is to be applied in the same way as it was applied when first promulgated." It is open to doubt whether

a judgment, although the legal priorities of creditors are not affected thereby (*b*), the power of preference, which the executor or administrator enjoys at law, no longer exists; for no payment to any creditor, made after notice of the judgment, will be allowed in his account (*c*). The decree, however, must be for administration, for it has been held that an order in an administration action, under Ord. XV. r. 1, merely for an account by an executrix and reserving further consideration, does not affect the right of creditors to sue her, or her right to prefer creditors (*d*). The right of an executor to retain can, but the right to prefer cannot, be exercised after an administration decree (*e*).

a creditor who has been partly paid by an executor shall not receive any further payment from the Court until all the other creditors are paid proportionably.

It may here be observed that where an executor or administrator, before a suit has been commenced for the administration of the estate of the deceased, has paid some off the creditors a certain proportion of their debts, the Court will not make any further payment to them, out of either the legal or equitable assets, until all the other creditors are paid proportionably; This point was decided by Sir L. Shadwell, V.-C., on the ground, that when a creditor goes into the Master's Office to establish his debt, he must show what was the amount due at the death of his debtor and what he has received since; and as it is one of the leading maxims of a Court of Equity, that equality is equity, the creditors who have been paid in part ought not to receive any further part either of the legal or equitable assets, until the other creditors have been paid the same proportion of their debts (*f*).

the rule was rightly applied in *Parker v. Ringham*, assuming the creditor obtained his judgment before the decree was made.

(*b*) *Nunn v. Barlow*, 1 Sim. & Stu. 588. But see *ante*, p. 771, as to the effect of sect. 10 of the Judicature Act, 1875.

(*c*) *Jones v. Jukes*, 2 Ves. 518; *Mitchelson v. Piper*, 8 Sim. 64; *Irby v. Irby*, 24 Beav. 525. But in taking the account, the executor or administrator has a right to stand in the place of the creditor he has paid: *Jones v. Jukes*, 2 Ves. 518.

(*d*) *Re Barrett*, 43 C. D. 70.

(*e*) *Re Hankey*, [1899] 1 Ch. 541, 542, *per* North, J.

(*f*) *Wilson v. Paul*, 8 Sim. 63; *Mitchelson v. Piper*, *ibid.* 64.

SECTION VI.

The Right of the Executor or Administrator to retain a Debt due to him from the Testator or Intestate.

As an executor or administrator, among creditors of equal degree, may pay one in preference to another, so it is another of his privileges that he has a right to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree (*g*).

This remedy arises from the mere operation of law, on the ground that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt: And, therefore, he may appropriate a sufficient part of the assets in satisfaction of his own demand: otherwise he would be exposed to the greatest hardship; for since the creditor who first commenced an action was entitled to a preference in payment, and the executor can commence no action, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Thus, from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction (*h*). But the privilege was until recently accompanied with this limitation, that he should not retain his own debt as against those of a higher degree: for the law places him merely in the same situation as if he had sued himself as executor, and recovered his debt, which there could be no room to suppose during the existence of those of a superior order (*i*). The right of retainer

He can retain against a creditor of superior degree.

(*g*) *Woodward v. Lord Darcy*, Plowd. 184. As to the right of an executor to retain a legacy to meet a debt due from the legatee to the deceased, see *post*, Pt. III. Bk. III. Ch. II. § IX.

(*h*) 2 Black. Com. 511.

(*i*) 3 Black. Com. 18; Com. Dig. Admon. (C. 2); 1 Saund. 333 (note (6), to *Hancock v. Prowd*); Godolph. Pt. 2, c. 11, s. 3; Toller, 295. However, according to the opinion of other writers, the principle on which the executor's right to retain is founded is, "*In equali jure potior est conditio possidentis*:" Fonblanq. Treat. Eq. B. 4, Pt. 2, c. 2, s. 2, note (*m*). Where a mortgagor dies *insolvent* and the mortgagee then realizes his security, and after paying himself the mortgage debt out of the proceeds has a surplus in his hands, he cannot, although he be executor of the mortgagor, retain that surplus in payment of a simple contract debt due to himself from the mortgagor, and so give himself a preference over other creditors of a higher degree, but must hand it over to the mortgagor's legal personal representative as part of his estate: *Talbot v. Frere*, 9 C. D. 568; but see *infra*. And see the statement of the principle of "retainer," by Jessel, M. R., in this case, at p. 570. An executor cannot in an action to administer his

Right of
retainer not
abolished by
Hinde
Palmer's Act.

by an executor has not been abolished by Hinde Palmer's Act (32 & 33 Vict. c. 46), but it has been enlarged so as to enable the executor to retain his debt against a creditor of higher degree than himself (*k*). It follows, therefore, that an executor who is only a simple contract creditor of his testator can retain his debt as against a specialty creditor (*l*).

An executor's right to retain a debt due to himself does not make him a secured creditor within the meaning of sect. 10 of the Judicature Act, 1875, and his right to retain is not affected by that section, although it may be doubted whether such was not the intention of the legislature (*m*).

When an
executor of
an executor
may retain.

If an executor dies after having claimed a right of retainer without having actually exercised it, leaving another executor of the testator surviving, the executors of the deceased executor have the right of retainer for the benefit of his estate (*n*).

This principle has been subsequently affirmed subject to this restriction, viz., that the executor's right of retainer is limited to so much of the assets of his testator as come into the possession or control of the executor or are paid into Court during his lifetime, and, if after asserting in his lifetime a right of retainer he die without exercising it, it is only in respect of these that his representatives may exercise that right for the benefit of his estate (*o*).

An administrator, who is an annuitant under covenant by an insolvent intestate, is entitled to retain all arrears falling due during administration, but only to prove for the value of his future annuity (*p*).

Right of
retainer
limited to

An executor's right of retainer extends only to funds actually or constructively in his possession. Accordingly, where the

testator's estate set up his right of retainer as against a judgment creditor: *Re Marvin*, [1905] 2 Ch. 490; *post*, p. 801. A balance order under the Companies Act against the personal representative of a deceased contributory does not constitute the liquidator a judgment creditor so as to give him a priority and to prevent the exercise by the executor of his right of retainer: *Re Hubbock*, 29 C. D. 934; cf. *Re Marvin*, *supra*. See further, Pt. v. Bk. II. Ch. I.

(*k*) *Re Harris*, [1914] 2 Ch. 395; *Olpherts v. Coryton*, [1913] 1 Tr. 211.

(*l*) *Ibid*.

(*m*) *Lee v. Nuttall*, 12 C. D. 61; *Re May*, 45 C. D. 499, 502; *Re Baker*, 44 C. D. at p. 272.

(*n*) *Wilson v. Coxwell*, 23 C. D. 764.

(*o*) *Re Compton*, 30 C. D. 15. In this case Cotton, L. J., held that unless the case of *Wilson v. Coxwell* were restricted in this way, that case must be treated as overruled.

(*p*) *Re Becman*, [1896] 1 Ch. 48.

insolvent estate of a deceased person, the subject of an old administration suit, became entitled to a fund in Court to the credit of another suit, and the fund was transferred to the credit of the administration suit, it was held that the present administrator of the deceased, a creditor, had no right of retainer against the balance in Court (*q*).

funds in executor's possession.

The right to recover the debt must be vested in the executor or administrator who seeks to retain it. An equitable tenant for life of a settled capital sum owing under a covenant cannot therefore, on being appointed administrator, retain the amount where the trustees of the fund are the proper persons to sue for it (*r*).

This privilege of the personal representative to retain for his own debt exists notwithstanding a judgment for an account has been made in a suit by the other creditors for the administration of the assets: and notwithstanding the assets out of which he seeks to retain his debt came to his hands after the judgment: for the judgment does not affect the legal priorities of creditors: and there is no distinction in this respect between assets possessed prior to the judgment and subsequent to it (*s*). And in the administration of a testator's estate, the right of an executor to retain for his own debt is not affected by the circumstances that he is himself the plaintiff suing on behalf of himself and all the other creditors, and that he has submitted to account in the ordinary form of an administration decree (*t*).

Executor may retain out of assets received after a judgment for an account.

Right to retain unaffected by fact that executor is suing on behalf of himself and all other creditors.

A creditor-administrator was entitled to prefer his own debt under the form of creditor's administration bond in use prior to 1st January, 1900 (*u*). Under the form of bond now in use, however (as to which see Note on Probate Practice (1899), W. N. 262), such right of retainer is expressly excluded.

When the debt due to the executor of an insolvent testator exceeds the value of the testator's assets, the executor is not bound to realize the assets before exercising his right of retainer, but is entitled to retain the assets in specie in satisfaction of his debt (*v*), nor is he obliged to appropriate chattels of the

Retainer of assets in specie.

(*q*) *Pulman v. Meadows*, [1901] 1 Ch. 233.

(*r*) *Re Dunning*, 54 L. J. Ch. 900; *Re Hayward*, [1901] 1 Ch. 221.

(*s*) *Nunn v. Barlow*, 1 Sim. & Stu. 588.

(*t*) *Campbell v. Campbell*, 16 C. D. 198.

(*u*) *Davies v. Parry*, [1899] 1 Ch. 602; *Re Belham*, [1901] 2 Ch. 52. See *ante*, p. 353.

(*v*) *Re Gilbert*, [1898] 1 Q. B. 282.

exact amount of his debt. When the chattels are realized, the balance over (if any) goes to the other creditors (x).

Right of
retainer not
lost by order
for adminis-
tration under
the Bank-
ruptcy Act,
1883.

An executor-creditor is not bound, in order to preserve his right of retainer out of the assets he has got in, to assert his right before occasion arises, as on an attempt to take assets out of his possession: if he assert it then his right will be protected, unless he has done some act by release or otherwise to deprive himself of it. An order for the administration of the estate of an insolvent testator under sect. 130 of the Bankruptcy Act, 1914, will not deprive him of his right of retainer out of assets which he has got in, even though by mistake he has paid over the assets to the official receiver, and proved for his debt in the bankruptcy, provided he withdraws his proof (y).

The right to
retain is not
lost by pay-
ment of the
money into
Court.

The right of retainer is not lost by the circumstance of the executor or administrator having paid into Court, in a creditor's suit, the money which has been received on account of the assets of the deceased (z): And where the fund in Court is insufficient to discharge the debt of the executor or administrator, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied (a). And the right of retainer by an executor was held to prevail against the plaintiff's right to the costs of the action, and against the debts of the other creditors, in respect of policy moneys paid into Court to the credit of the action by an insurance company, in pursuance of an order made on the application of the plaintiff and in the presence of the executor, on the ground that the payment into Court was in substance a payment by the executor (b).

Retainer
without notice
of a debt of
higher degree.

Where an executor retains his own debt and fully distributes the assets, *bonâ fide* and without undue haste, without notice of a debt of a higher degree, the creditor cannot follow the assets so retained by the executor (c).

After a receiver is appointed in an administration action, if assets are collected by the receiver, there is no right of retainer

(x) *Re Broad*, 105 L. T. 719.

(y) *Re Rhoades*, [1899] 1 Q. B. 905; [1899] 2 Q. B. 347; *Re Broad*, *supra*.

(z) *Davenport v. Moss*, 14 W. R. 453; *Re Harrison*, 32 C. D. 395; *Re Giles*, [1893] 1 Ch. 956.

(a) *Chissum v. Deves*, 5 Russ. 29; *Langton v. Higgs*, 5 Sim. 228; *Tipping v. Power*, 1 Hare, 405, 411; *Hall v. McDonald*, 14 Sim. 1; and see *Re Turner*, [1907] 2 Ch. 126.

(b) *Richmond v. White*, 12 C. D. 361 (reversing the decision of Hall, V.-C., 10 C. D. 727).

(c) *Re Fludyer*, [1898] 2 Ch. 562.

by the executor (*d*); but if before the appointment of the receiver the executor has received assets, which he afterwards pays over to the receiver, he has a right of retainer, which he does not lose from the simple fact that the money was paid to the receiver (*e*). The reason for this seems to be that when a receiver is once appointed, a debtor to the estate may pay his money direct to the receiver and obtain a good discharge, so that the appointment of a receiver prevents the money actually or theoretically coming into the executor's hands, and *without possession there can be no retainer* (*f*).

The Court, however, will not interfere with an executor's right of retainer by appointing a receiver at the instance of the plaintiff in a creditor's administration action merely because the executor will probably exercise his right to the prejudice of the general body of creditors, nor unless it is shown that the assets are being wasted (*g*).

An executor does not lose his right of retainer in an administration action merely by delay—*e.g.*, by not claiming his right until after the chief clerk has made his certificate—provided the delay can be satisfactorily explained and there are assets against which he can exercise his right (*h*).

Right not
lost by delay.

But where in an action by a creditor the executor does not plead *plene administravit* or set up his retainer and the creditor recovers judgment, the executor cannot in a subsequent administration action set up his retainer against the judgment creditor (*i*).

It would seem that an executor cannot retain, out of such of the assets as are merely *equitable*, sufficient to pay the whole of a debt due to him from the deceased, but only a proportionable

No retainer
allowed out of
equitable
assets.

(*d*) See *Taaffe v. Taaffe*, [1902] 1 Ir. R. 148.

(*e*) *Re Harrison*, 32 C. D. 395; *Re Jones*, 31 C. D. 440; *Richmond v. White*, 12 C. D. 361; *Re Giles, ubi supra*; and cf. *Re Rhoades*, [1899] 2 Q. B. 347. Generally the appointment of a receiver takes effect by the order of appointment upon his giving security, and is of no effect until the security has been perfected: *Edwards v. Edwards*, 2 C. D. 291. But in a case where an administrator defendant in an administration action was also solicitor to the plaintiff, it was held that the defendant, between the time of the order of the appointment and the perfecting of the receiver's security, stood in no better position than he would have done after the receiver had perfected his security, and therefore could not exercise his right of retainer over moneys paid to him during that time: *Re Birt*, 22 C. D. 604.

(*f*) *Re Jones*, 31 C. D. 440, 444, per Kay, J. See *ante*, p. 797.

(*g*) *Re Wells*, 45 C. D. 569.

(*h*) *Re Giles*, [1896] 1 Ch. 956.

(*i*) *Re Marvin*, [1905] 2 Ch. 490.

part with the other creditors (*j*): For in equity all debts are equal; and a Court of Equity will never assist a retainer (*k*).

An executor who has acquired by bequest from a creditor a debt, which the creditor in his lifetime has proved in a suit for the administration of the testator's estate, has no right of retainer in respect of such debt, as if it had originally been due to himself (*l*).

Nor out of
estate devised
to executor as
trustee to pay
debts.

A trustee of an estate, devised or conveyed to him for the purpose of paying debts, has no right of retainer thereout whether he is executor or not (*m*).

(*j*) *Re Rhoades*, [1899] 2 Q. B. 347, 354. As to the distinction between equitable and legal assets, see *post*, Pt. IV. Bk. I. Ch. I. Real estate was by the stat. 3 & 4 Will. IV. c. 104, made assets for the payment of debts only in equity, and an executor had no right of retainer against it: *Walters v. Walters*, 18 C. D. 182; *Re Illidge*, 24 C. D. 654, 658; 27 C. D. 478. Although, by virtue of the Land Transfer Act, 1897, the whole of the estate of a testator or intestate dying after the commencement of the Act is legal assets, the right of retainer has been held not to extend to the real estate: *Re Williams*, [1904] 1 Ch. 52.

(*k*) *Anon.*, 2 Cas. Chanc. 54; *Hopton v. Dryden*, Prec. Chanc. 181; *Bailey v. Ploughman*, Mosely, 95. It was stated by Verney, M. R., that "the rule of this Court in cases of retainer is, unless the party can show a legal right to retain, we never give it him: if he can show a legal right, we never take it away from him": *Chapman v. Turner*, Vin. Abr. Exors. (D. 2), pl. 2; *Re Baker*, 44 C. D. 272.

(*l*) *Jones v. Evans*, 2 C. D. 420, considered in *Re Harris*, [1914] 2 Ch. 395, *infra*.

(*m*) *Bain v. Sadler*, L. R. 12 Eq. 570. An heir-at-law or devisee has no right of retainer either out of the proceeds of sale of real estate, or out of rents received by him for a debt due to him on simple contract from the testator or intestate: but, *semble*, an heir-at-law or devisee, when the estates are not charged with debts, may, notwithstanding Hinde Palmer's Act (32 & 33 Vict. c. 46: see *ante*, p. 782), retain a debt to which he is entitled by specialty in which the heirs are bound: *Re Illidge*, 27 C. D. 478; reversing the decision of Chitty, J., 24 C. D. 654, as regards debts to which an heir-at-law is entitled by specialty in which the heirs are bound. With regard to specialties made since the commencement of the Conveyancing Act, 1881, by virtue of sect. 59 of that Act, there would seem to be no distinction between a specialty in which the heirs are expressly bound and a specialty in which they are not so bound. It would also seem that since the Land Transfer Act, 1897, as to any person dying after the 1st January, 1898, the heir or devisee can have no right to retain (except as to copyholds and customary freeholds excepted from the operation of the Act) so long as the real estate remains vested in the legal personal representative. A devisee who was surety for the testator by specialty in which the heirs were bound (who, if he had paid off the debt, would have had a right to the benefit of the specialty) not having paid it off, could only be treated as a simple contract creditor, and had no right of retainer; but a devisee, who was a creditor by specialty in which the heirs were bound, was entitled to retain, because, in the latter case, there was a common law right of action against the heir who was allowed the right of retainer as he could not sue himself; whereas in the former case the simple contract creditor could only obtain a

An executor or administrator may retain not only for debts which he claims beneficially, but also for those to which he is entitled as trustee. Thus, in *Plumer v. Marchant* (*n*), A., before his marriage, covenanted with B. and C. to leave them by his Will, or that his executors, within six months after his death, should pay them 700*l.*, in trust to pay the interest to his wife for life, and on her death, to divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators, in a penalty for performance: On his dying before his wife, without issue and intestate, it was holden that B., in the character of administrator, might retain assets to that amount during the life of the widow, against a bond creditor who sued before the six months were elapsed (*o*).

The executor may retain for debts due to him as trustee:

An executor who has been guilty jointly with his testator of a breach of trust, cannot retain assets against the trust liability to the prejudice of the other creditors, and the beneficiaries claiming through him are in no better position. His co-executor, however, being himself innocent of the breach of trust, may, on being appointed trustee in place of the testator,

judgment as against the real estate for the benefit of himself and all other creditors. Hinde Palmer's Act, although it took away priority of creditors by specialty, did not take away the common law action against the heir-at-law nor the consequent right of retainer: *per* Cotton, L. J., in *Re Illidge* (*ubi supra*) at p. 482, referring to and approving the decision of Wickens, V.-C., in *Ferguson v. Gibson*, L. R. 14 Eq. 379. The Courts of Common Law recognized the executor's right of retainer in respect of a debt due to him as *cestui que trust* (*Roskelley v. Godolphin*, T. Raym. 483; *Marriott v. Thompson*, Willes, 186; *Loane v. Casey*, 2 W. Bl. 965), to the extent of debts which according to the trust were payable to the *cestui que trust*, and provided that the debt or demand was one of which account could be taken by a jury: *De Tastet v. Shaw*, 1 B. & A. 664. However, in Courts of Equity the right of retainer of an executor was recognized in a creditor's suit in respect of a debt, the amount of which could only be ascertained by a Court of Equity: *Re Morris's Estate*, L. R. 10 Ch. 68.

(*n*) 3 Burr. 1380 (cited 3 A. & E. 858, *per curiam*).

(*o*) Cf. *Sander v. Heathfield*, L. R. 19 Eq. 21; *Crowder v. Stewart*, 16 C. D. 368. One of several executors is entitled to a right of retainer in respect of a mortgage debt due from the testator to a body of trustees of whom that executor is one: *Re Hubback*, 29 C. D. 934. The executor of a deceased trustee cannot, unless he elects to act as trustee, be compelled to exercise his right of retainer in favour of the *cestuis que trust* in respect of moneys owing by the deceased trustee to the trust estate: *Re Bennett*, [1906] 1 Ch. 216, overruling *Fox v. Garrett*, 28 Beav. 16; see also *Re Ridley*, [1904] 2 Ch. 774; and cf. *Re Funnell*, 107 L. T. 145 (executor of executor) and *Re Olpherts* (No. 2), [1913] 1 Ir. R. 381.

even after the latter's death, exercise the right of retainer in respect of the trust liability (p).

he may retain for debts due to him though actually payable to another as trustee for him.

Conversely, the executor or administrator may retain for debts due to another in trust for him (q). But in *Re Dunning* (r), Lindley, L. J., after stating that the right of retainer ought not to be extended, says: "The furthest point was reached in the case of *Cockroft v. Black* (q), where an executrix being entitled beneficially to the debt due from the testator was allowed to retain, although there was in existence a trustee of the debt for her." In *Re Dunning* the executrix was the wife of one of several trustees of a settlement who, acting as solicitor for the trust, had appropriated part of the trust fund to his own use. The executrix and her children were beneficiaries under the settlement, and on behalf of her own life interest and of the interests of her children in remainder claimed the right to retain, and it was held that the trustees of the settlement being the persons to sue for and recover the funds appropriated and not the executrix, the latter had no right to retain. The same principle was applied by Byrne, J., in *Re Hayward* (s), and by Joyce, J., in *Re Sutherland (Duchess)* (t).

Where, however, a grant of administration was made to the manager of a bank who were creditors of the deceased, but to the manager as an individual, and not to the use of the bank, and an administration decree was made before he had appropriated any money towards the bank's debt, it was held that he could not retain the amount of the debt (u).

(p) *Re Harris*, [1914] 2 Ch. 395.

(q) *Cockroft v. Black*, 2 P. Wms. 298; *Franks v. Cooper*, 4 Ves. 763; *Loomes v. Stotherd*, 1 Sim. & Stu. 461, in which last case Sir J. Leach, V.-C., held that as an executor may retain his own debt or the debt of his trustee, so a devisee of the realty may retain for his own specialty debt or the debt of his trustee. But Byrne, J., in *Re Hayward* (*ubi supra*) considered that *Loomes v. Stotherd* could not be treated as being an authority for the proposition that the tenant for life, or *cestui que trust*, is entitled to retain, although there are trustees competent to sue. See further on the right of the heir to retain, *Player v. Foxhall*, 1 Russ. Chanc. Cas. 538; *Re Illidge*, 27 C. D. 478. See also *ante*, p. 802, n. (m).

(r) 54 L. J. Ch. 900.

(s) [1901] 1 Ch. 221.

(t) [1914] 2 Ch. 720, where it was said that if a retainer be ever allowed to a beneficiary for a debt due to a trustee, it is only when the trust is a simple and absolute trust. So an administrator who is an undischarged bankrupt has no right to retain a debt due to him from the intestate, the trustee in bankruptcy being the proper person to sue: *Wilson v. Wilson*, [1911] 1 K. B. 327.

(u) *Re Richards*, [1901] 2 Ch. 399.

The right of indemnity belonging to an executor who is surety for an unpaid debt of his testator creates an equitable debt in respect of which he may exercise the right of retainer (*v*), and where the administratrix of a mortgagor had joined in a mortgage by him as surety, and the mortgagor had expressly covenanted with her for payment of the mortgage debt and for repayment of any moneys paid by her as such surety, it was held that she was a specialty creditor in respect of the mortgage debt at law, and was entitled to retain the assets to answer the debt (*w*).

Retainer by
executor
surety.

Where a surety gives a legacy to the debtor whose debt he has guaranteed, the surety's executor is entitled to retain out of the legacy the amount paid to the principal creditor out of the surety's estate notwithstanding that the debtor has become bankrupt and that the principal creditor has proved in the bankruptcy and received a dividend in respect of the debt (*x*).

Where the person entitled to administration is an infant, and an administration *durante minoritate* is granted, not only may the administrator retain for his own debt (*y*), but also if the infant in point of right has a title to retain for a debt due to himself, the administrator may insist on that right (*z*). So where the creditor is a lunatic, and administration has been granted to the defendant for the use of the lunatic, the right of retainer shall not be prejudiced (*a*).

Retainer by
an adminis-
trator *durante*
minoritate :

by an admin-
istrator
durante
dementia :

If administration be granted to a creditor, as such, and afterwards be repealed, at the suit of the next of kin, such creditor shall retain against the rightful administrator (*b*). On the petition, however, of the other creditors, the Court, on granting administration to a particular creditor, as such, will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own (*c*); and administration to a creditor is generally so granted (*d*). But under the

by a creditor
administra-
tor :

(*v*) *Re Giles*, [1896] 1 Ch. 956; *Re Beavan*, [1913] 2 Ch. 595.

(*w*) *Re Allen*, [1896] 2 Ch. 345; and see *infra*, p. 808, n. (*q*).

(*x*) *Re Melton*, [1918] 1 Ch. 37, overruling *Re Binns*, [1896] 2 Ch. 584.

(*y*) *Roskelley v. Godolphin*, T. Raym. 483; Com. Dig. Admon. (F.).

(*z*) *Franks v. Cooper*, 4 Ves. 764.

(*a*) *Ibid.* 763.

(*b*) *Blackborough v. Davis*, 1 Salk. 38.

(*c*) Toller, 106.

(*d*) Fonbl. Treat. on Eq. Bk. 4, Pt. 2, c. 2, s. 2, note (*m*). If letters of administration are granted to a creditor whose debt is barred, he is required to give a bond not to prefer his own debt: *Coombs v.*

common decree against an administrator, who had obtained the letters of administration as a creditor, and entered into the form of bond in use prior to January 1st, 1900, directing the accounts to be taken in the usual way, and the assets to be applied in a due course of administration in payment of the intestate's debts, the Master had no authority to disallow the administrator's claim to retain, on proof by affidavits that there had been a waiver of the right on his part, by arrangement with the other creditors: In order to justify such a departure from the ordinary course of administering assets in a Court of Equity, it was held that there ought to be a specific instruction to the Master to that effect (*e*).

by executor
of executor:

An executor of an executor is entitled to retain, out of the assets, debts due from the testator, either in his own right, or as the executor of the deceased executor (*f*). So where a bond creditor took out administration *de bonis non* to his debtor, and died before he had made any election in what particular effects he would have the property altered by retainer; it was held that the executor of the creditor, in accounting for the assets of the debtor, might deduct the debt (*g*).

by executor
of adminis-
trator:

One of three executors, who is also one of two joint creditors, has a right of retainer in respect of his joint debt (*h*).

by executor
who is joint
creditor:

by adminis-
trator of
executor to
whom a debt
is due jointly
with another:

The administrator *cum testamento annexo* of a deceased executor, in accounting for the executor's receipts of the assets, was held (*i*) not to be entitled, by way of discharge, to the amount of a debt owing from the testator to the executor jointly with another person as partner, the executor having predeceased such partner, without having, in point of fact, done any act in the

Coombs, L. R. 1 P. & M. 193, 288. See as to present form of bond, *ante*, pp. 353, 799.

(*e*) *Spicer v. James*, 2 Myl. & K. 387; *Thompson v. Cooper*, 1 Coll. 81.

(*f*) *Hopton v. Dryden*, Prec. Ch. 180; *Thomson v. Grant*, 1 Russ. Chanc. Cas. 540, *in notis*: But not the executor of one of several executors, one or more of whom is still living: Prec. Ch. 181. Nor can the executors of an executor, if they are not the personal representatives of the original testator, retain assets which never came into the hands or under the control of the original executor: *Re Compton*, 30 C. D. 15; *ante*, p. 798.

(*g*) *Weeks v. Gore*, 3 P. Wms. 184, note to *Croft v. Pyke*, in which latter case a point arose, but was not decided, viz., whether if a debtor dies, having made his creditor executor, and then the executor dies, having intermeddled with the goods, but before probate, and before any election made, his executor can retain.

(*h*) *Crowder v. Stewart*, 16 C. D. 368; *Re Hubback*, 29 C. D. 934.

(*i*) *Burge v. Brutton*, 2 Hare, 373.

exercise of his right of retainer. It was not, however, at all questioned in this case, but indeed conceded by the Court (Wigram, V.-C.), that one of two partners to whom a debt is due, being made an executor, might retain that debt. But it was ruled that if such an executor dies, so that the interest in the debt wholly devolves on his surviving partner, the right of retainer ceases, and cannot be exercised by the representative of the executor.

The Married Women's Property Act, 1882, s. 3, which deals with loans by a wife to her husband does not apply to the subject of retainer by a woman as executrix of her husband. Consequently, a widow, the administratrix of her late husband, whose estate was insolvent, was allowed to retain out of the assets come to her hands as administratrix the amount of a loan to him in his business out of her separate estate (*j*).

It is clear, as there has already been occasion to show (*k*), that an executor *de son tort* cannot retain for his own debt, even of a superior degree to that upon which he is sued. There is, indeed, one exception to this rule; for a party who, by stat. 43 Eliz. c. 8, becomes executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator who has obtained the grant fraudulently (*l*), is, by the express provision of that Act, allowed to retain (*m*).

by executor
de son tort :

If the same person be the personal representative both of the creditor and of the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor to satisfy the debts due to him as the representative of the creditor (*n*).

case where
the represen-
tative of the
creditor is
also the
representative
of the debtor :

If there are two joint and several obligors, and one of them dies, having made the obligee his executor, in such case the obligee, if he has not received satisfaction out of the assets of the deceased obligor, may sue the survivor; for, being jointly

if two are
jointly and
severally
bound, and
one makes
the obligee

(*j*) *Re May*, 45 C. D. 499; *Re Ambler*, [1905] 1 Ch. 697; cf. *Re Leng*, [1895] 1 Ch. 652.

(*k*) *Ante*, p. 187.

(*l*) *Ante*, p. 179.

(*m*) Com. Dig. tit. Administrator (C. 3); Wentw. Off. Ex. Ch. 14, p. 336, 14th edit.; *Vernon v. Curtis*, 2 H. Black. 26, note (*b*); Toller, 366.

(*n*) *Burnet v. Dixie*, 1 Roll. Abr. 922; Exors. (L.) 2; *Fox v. Garrett*, 28 Beav. 16; in which last case both estates were being administered by the Court, and it was held that the administrator was bound so to retain at the instance of the parties interested in the creditor's estate; but see *Re Bennett*, *ante*, p. 803, n. (*o*).

his executor,
he may either
retain or sue
the survivor.

and severally bound, he may sue which of them he pleases, and though the debt be one, yet the obligations are several; and no assets appear of the value of the debt to retain; and there might be a judgment, against which he could not retain (*o*).

So if the obligor appoint the obligee his executor, and there are no assets out of which he may retain, the obligee may sue the heir if he is bound (*p*).

A surety,
executor of
principal who
is jointly
bound, can
retain.

If two are *jointly* bound in an obligation, the one as principal, and the other as surety, and on the principal's death, the surety becomes his personal representative, and, on forfeiture of the bond, discharges the debt, he has the ordinary right of retainer for that debt, in preference to all other creditors of equal degree (*q*).

If an executor who is a surety for a debt of a testator pays the debt, he has, as we have seen, a right of retainer; but he must have paid the debt as surety while he had the assets in his control; and therefore where an executor did not make the payment as surety till after the appointment of a receiver, it was held that, as at the time he paid the debt there was no money in his hands, he had no right of retainer (*r*).

Damages
which are
arbitrary
cannot be
retained.

Damages which in their nature are arbitrary, such as damages founded on *tort*, cannot be retained (*s*).

(*o*) *Crosse v. Cocke*, 3 Keb. 116; *post*, Pt. III. Bk. III. Ch. II. § ix.

(*p*) *Wankford v. Wankford*, 1 Salk. 304. See further on this subject, *post*, Pt. III. Bk. III. Ch. III. § ix.

(*q*) *Boyd v. Brooks*, 34 Beav. 7; affirmed on appeal, 34 L. J. Ch. 605; *Bathurst v. De la Touche*, 34 Beav. 9, note; *Wildes v. Dudlow*, L. R. 19 Eq. 198. See also *Re Allen*, [1896] 2 Ch. 345; *Re Melton*, *ante*, p. 805. An executor who was surety to the Crown for the testator and has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate: *Re Churchill*, 39 O. D. 174. Where the wife of the testator, having real estate settled on her for life with a general power of appointment, had appointed it as collateral security for a mortgage debt of the testator and had been left by the testator as his executrix, it was held that her right as surety to be indemnified created a simple contract debt only and did not entitle her to retain as against specialty creditors: *Ferguson v. Gibson*, L. R. 14 Eq. 379. This decision of Wickens, V.-C., was approved by Cotton, L. J., in *Re Illidge*, 27 C. D. 478, 482.

(*r*) *Re Harrison*, 32 C. D. 395; *Re Beavan*, [1913] 2 Ch. 595.

(*s*) *Loane v. Casey*, 2 W. Black. 968, by Blackstone, J. Claims by an executor for breach of a covenant to assign a policy and to replace furniture, if sold, by other furniture of like value, are claims for damages for breach of pecuniary contracts for which there is a certain standard or measure, and may therefore, on the authority of *Loane v. Casey*, be retained: *Re Compton*, 30 C. D. 15.

Where there are co-executors or co-administrators, each being a creditor of the deceased, the one cannot retain for his own debt to the prejudice of the other; for several joint executors or administrators are considered but as one person in law; the possession of one is the possession of the other; the receipt of one is the receipt of the other; and, therefore, the retainer of one must be considered as the retainer of the other, and must enure, for, their mutual benefit, in the discharge of the debts of both in proportion (*t*).

An executor cannot retain against his co-executor :

In *Kent v. Pickering* (*u*), where, in a creditor's suit, a balance had been found, by the Master's report, to be jointly due from two executors to their testator's estate, and one of the executors was a creditor, it was held by Lord Langdale, M. R., that such executor had a right to retain his debt out of the assets consisting of the balance due from himself and his co-executor.

he may retain out of a balance found to be due from himself and his co-executor to the estate.

An executor or administrator may retain for a debt due to himself though it may be more than six years old; for as an executor may pay a debt to another though he might have pleaded the Statute of Limitations, why may he not pay himself? (*v*) In *Hopkinson v. Leach* (*x*) Sir John Leach, V.-C., was of opinion that the executor might retain in such a case: But his Honour directed the opinion of a Court of Law to be taken. The right to retain was confirmed in *Stahlschmidt v. Lett* (*y*).

Retainer for debt more than six years old.

The Court will not order a fund to be paid out to an executor or administrator having the legal title to a statute-barred debt merely in order to enable him to acquire a right of retainer thereout (*z*).

An executor may retain a legacy against a statute-barred debt due from the legatee to the testator (*a*), but he cannot retain a statute-barred debt for the benefit of the estate as

(*t*) *Chapman v. Turner*, 11 Vin. Abr. 72, tit. Exors. (D.) 2, referred to by Wright, J., in *Re Gilbert*, [1898] 1 Q. B. at p. 286.

(*u*) 2 Keen, 1.

(*v*) *Post*, Pt. iv. Bk. II. Ch. II. § II.

(*x*) 7 May, 1819; MS. Madd. Pract. 583, 2nd edit.

(*y*) 1 Sm. & G. 415. See also *Hill v. Walker*, 4 Kay & J. 166; *Budgett v. Budgett*, [1895] 1 Ch. 202, 215. So the creditor of an intestate is entitled to a grant of administration, although his right of action is barred by the statute: *Coombs v. Coombs*, L. R. 1 P. & D. 288.

(*z*) *Trevor v. Hutchins*, [1896] 1 Ch. 844.

(*a*) *Re Taylor*, [1894] 1 Ch. 671; *Dingle v. Coppen*, [1899] 1 Ch. 726; *Re Savage*, [1918] 2 Ch. 146.

against a person claiming a legal right to damages against the estate (b).

An executor or administrator cannot, however, retain a debt due to himself, if it is such as he is prevented from enforcing by reason of the Statute of Frauds (c).

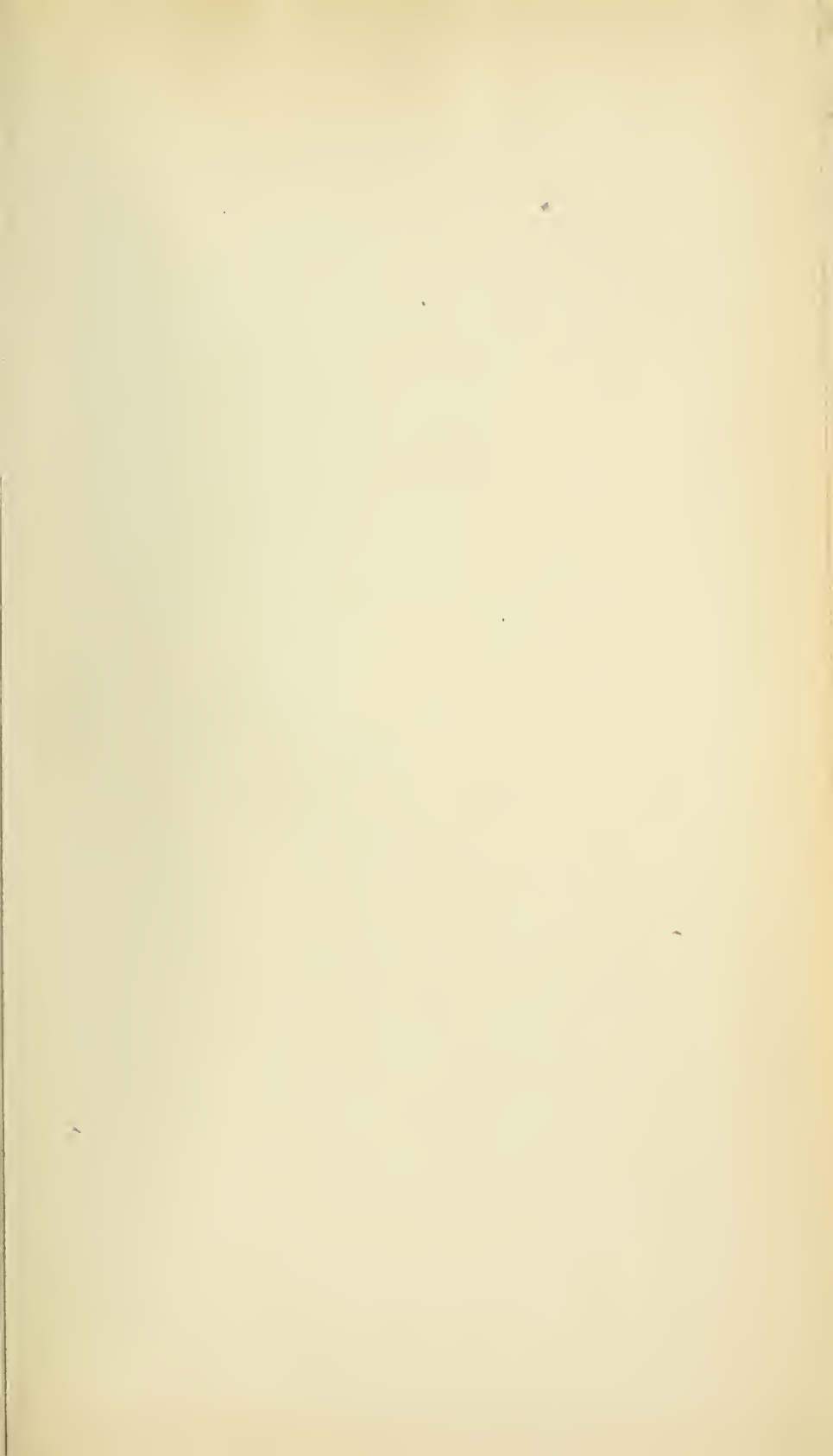
Part I. of the Land Transfer Act, 1897, has not the effect of conferring any new right of retainer or priority in favour of the personal representative as against real assets (d).

(b) *Dingle v. Coppen*, *ubi supra*.

(c) *Re Rownson*, 29 C. D. 358.

(d) *Re Williams*, [1904] 1 Ch. 52.

END OF VOL. I.



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